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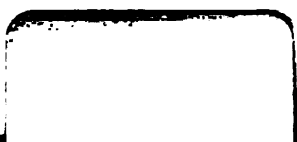
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REPORTS

OF

CASES

ARGUED AND DETERMINED IN

THE COURT OF EXCHEQUER;

FROM

EASTER TERM, 32 GEORGE III.

TO

TRINITY TERM, 33 GEORGE III.

BOTH INCLUSIVE.

BY ALEXANDER ANSTRUTHER, Esq.

Of Lincoln's Inn, Barrister at Law.


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JUN 25 1901

PREFACE.



IT has often occurred to me as an unaccountable circumstance, that while the modern decisions of the other Courts in *Westminster-Hall* have been regularly published, no one has taken notes in that of the Exchequer for a similar purpose ; and that, since the publications of *Bunbury's Reports*, during the space of more than fifty years, the determinations of that Court have remained wholly unknown to the Profession at large. This appears the more singular, because the multifarious nature of the business transacted there, seems peculiarly to invite the Lawyer's attention, from the very general knowledge of his Profession which it is calculated to convey.

Such inattention to the solemn determinations of this Court is the more to be lamented, because several important subjects of legal inquiry are confined either wholly or chiefly to it.

When the public necessities have so much increased the burthens imposed on the subject, and extended the operations of the process of the Crown, the determinations of the Revenue Court, have become additionally interesting, and an acquaintance with them particularly important. Suits for tithes also have generally been prosecuted on the Equity side of this Court; and, from long practice, are considered as being peculiarly within its jurisdiction. The magnitude of this species of property, and the singularity of its nature, require that the rules by which it is governed should be generally known. There are no cases in which the evil consequences of forensic controversies are so much to be deplored, both in a political and moral light, as those which take place between a clergyman and his parishioners. Unfortunately, these disputes are but too frequent; and there is hardly any description of causes in *Westminster Hall* so generally tainted with acrimony, or pursued with so vexatious a spirit of litigation. In most instances, this arises from a misconception of the extent of their mutual rights. Were the legal decisions which ascertain and limit their respective claims universally understood, the

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evil would, it is to be hoped, soon be nearly, if not wholly, removed.

It seems also to be of considerable consequence to record those decisions which relate to the practice of one of the superior Courts. The subject is uninteresting in its nature, and scarcely connected in its branches. Consisting merely of positive rules, which depend more upon custom than upon principle, it affords nothing to lead the judgment, nothing to fill the mind, or to assist the memory. Numberless are the mistakes necessarily arising from that imperfect knowledge of the practice which is derived from tradition only; mistakes the more to be lamented, as the necessity of abiding by a general rule must sometimes inevitably retard or defeat the attainment of justice, in the individual case, and punish the suitor, for the errors of those to whom he entrusts the conduct of his cause.

These considerations have, among others, induced me to take notes in the Court of Exchequer, with a view to publication. I have endeavoured in the execution of my design, to

adhere as much as possible to the plan of those Reporters in the Courts of Law, whose method is most eminently sanctioned by the public approbation. After their example, it has been my aim, in the first place, to state the record or facts of each case as accurately as possible; to arrange the most weighty arguments of all the Counsel who were heard on each side, into one general discourse; and to report the opinions of the Court, as faithfully as it has been in my power.

In the Cases which occur on the Equity side of the Court, I have found the first part of this plan not so easily pursued, as in recording the decisions of the Court of Law. In the latter, the facts are generally certain, and the legal consequence alone in dispute. In Equity, the fact is to be ascertained by the Court; and the arguments of Counsel and the opinion of the Court generally contain both the result of fact from the evidence, and the inference of law from that fact. To state the evidence in such Cases, or the arguments upon it, would have been a task of useless prolixity. Besides, when it is once ascertained in what view the facts

appeared to the Court, so as to form the foundation of their decision, it becomes immaterial to the Lawyer from what combination of evidence that result was drawn. I have therefore endeavoured to prefix to each Case that statement of the facts, upon which the opinion of the Court proceeded, and have thus given the Report the same form as if the facts had been ascertained with the precision of a legal record.

Another distinction also occurs between the nature of Cases in Equity and those in the Courts of Law, which will sometimes create a difference in the method of reporting them. The latter are generally confined to a single point, and every fact and argument in the cause tends to support one general proposition. In Equity, it often happens that a variety of unconnected cases are brought together by some collateral circumstance into the same cause. It has, therefore, been frequently the practice of Reporters in Equity, to give each point in the cause, and the arguments and decisions upon it, separately; and this method I have, in several Cases, found it necessary, for the sake of per-

spicuity, to adopt. But wherever I have perceived such a connection in the cause, as to permit an unity of statement, and one general argument, I have been solicitous to preserve in my note that order in which the cause was produced before the Court.

In recording the opinions of the Judges, it has always been my endeavour to give the meaning and language of the Court as fully and accurately as possible ; but I have frequently found it very difficult to satisfy my own mind in this respect. To follow *verbatim* the rapid delivery of a written opinion is impossible to one who does not write short-hand. Yet I have generally been able to take such a note as recalled to my memory a more perfect representation of the judgment pronounced ; and, -at least, I flatter myself that the spirit and general outline have been preserved with some degree of accuracy.

In stating the reasonings of Counsel, it is the province of the Reporter to collect all the material arguments on each side, to measure the strength of each, and to marshal them in such

order as shall give them the greatest collective force. I have always found the labour of this part of my task fully recompensed by the pleasure and instruction it afforded. The arrangement is, therefore, in most instances, my own; but I have not ventured to insert any arguments which were not suggested at the bar. The references to the Cases cited will, I trust, be found correct, as I have always consulted the books themselves, and have inserted every authority which appeared to me materially applicable to the point it was cited to support.

Reports of Cases in the Court of Error in the Exchequer Chamber have already been published by Mr. *H. Blackstone*. Having also taken notes there, I have inserted a few of them in these volumes; but I have done so only when I thought that the difference in our statements might excuse my offering another report of them to the Public. A few decisions in the House of Lords are also inserted. If they are worthy the public attention, this will require no apology.

I am happy in having an opportunity thus to testify my gratitude to very many of my own Profession, for the most liberal assistance in the execution of my plan. To the eager and anxious kindness of private friendship, I stand in many instances peculiarly indebted; and the favour flatters me too much not to boast of it here. But from the whole Profession at large, I have experienced such an obliging readiness to communicate every thing which might be of service to me, as could result only from the most liberal minds, desirous to render the publication of general utility. It will give me the highest satisfaction to find, that I have been able, by any degree of accuracy in the execution of this work, to answer their wishes, and make some return for their kindness.

It is my intention to continue these Reports, if the manner in which the present Volumes are received should encourage me to hope for the approbation of those for whose use they are intended.

No. 2, ELM COURT, TEMPLE,

Dec. 15, 1795.

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CASES

ARGUED AND DETERMINED.

IN THE

COURT OF EXCHEQUER,

IN

EASTER TERM,

32 GEORGE III.

The Right Hon. Sir JAMES EYRE Knt. Lord
Chief Baron.

Sir BEAUMONT HOTHAM Knt.

Sir RICHARD PERRYNG Knt.

Sir ALEXANDER THOMSON Knt.

} Barons.

Sir ARCHIBALD MACDONALD Knt. Attorney Gen.

Sir JOHN SCOTT Knt. - Solicitor Gen.

BETWEEN

25th April 1792.

BOWMAN and Others, Plaintiffs,

AND

LYGON and Others, - Defendants.

A BILL had been filed by the defendants against the present plaintiffs for tythes describing themselves to be impropiators of the rectory of the parish. The answer denied their title as impropiators.

B

The present was a cross bill, to obtain a discovery of the title of the defendants to the rectory, and praying a production of the title-deeds, &c.; and particularly to have a discovery of the title of the defendants to agistment tythe; and whether the former occupiers of the lands of the plaintiffs had ever paid that species of tythe.

The defendants demurred to the discovery sought; and put in an answer, insisting that they were rightfully entitled to, and in possession of, the rectory.

Burton and Richards, in support of the demurrer, argued, that the plaintiffs had shewn no title to have the discovery prayed; the defendants being in possession, the Court cannot compel them to prove their title to the rectory. The plaintiffs do not even set up a counter claim to it, or pretend that any other is better entitled. In the case of *Selby v. Selby*, last term, the Lord Chancellor expressed a strong inclination to admit a demurrer to a bill, praying discovery of the title under which the defendant meant to support his claim, an ejectment having been brought by him against the plaintiff in equity, who was tenant in possession of the premises; but the demurrer was bad on a ground of form*; an amendment was allowed, and is not yet decided.

The present case is much more strong; here the discovery is sought against the person in possession.

* They stated, that in that case the Lord Chancellor had permitted the defendant to amend the demurrer; but he does not seem to have done so. See the same case again before the Court. 4 Bro. 11.

Lord Chief Baron EYRE.—Certainly there can be no discovery, if it is prayed by the farmer merely to have a pretext for withholding his tithes altogether, till the impropiator shall prove every item of his demand.

Abbot, for the plaintiff, took several objections to the demurrer. In form; it is over-ruled by the answer; the demurrer is to the discovery of the title, and the answer avers the goodness of the title.—Amendments of demurrers are rarely, if at all, granted, and are quite out of the usual practice of the Court. It is also bad in substance; by the original bill and answer the title is in issue between the parties, and therefore on a cross bill the plaintiffs have a right to a discovery of it. *Doble v. Potman*, Hardr. 160.—Even by original bill they would have been entitled to it in this case: *Heathcote v. Fleet*, 2 Vern. 442. *Morse v. Buckworth*, *ibid.* 443. *Brereton v. Gamul*, 2 Atk. 241. *Metcalf v. Harvey*, 1 Vez. 249. *Moodalay v. The East India Company*, 1 Bro. Rep. 471.—From these cases it appears, that a party sued, or likely to be so, is entitled to pray a discovery whether the party suing, or any other, has the right to the subject in dispute.

At all events, the plaintiffs are entitled to a discovery whether any payment of agistment tithe was ever made by the occupiers of the lands now held by them; a demurrer covering too much is bad *in toto*.

Burton, in reply. The answer does not over-rule the demurrer. The discovery prayed and demurred to is of the particular nature of the defendant's title;

the answer only avers that they have a title, that they are lawfully seized, without saying how.

In the case before Lord *Hardwicke*, *Metcalf v. Harvey*, the discovery was sought, for the purpose of defending the possession ; here to disturb it: in all the other cases, the party praying the discovery had some interest in the subject of it ; here none is pretended.

If there is any slip in the form of the demurrer, it is open to the defendants to demur *ore tenus* on payment of costs, or the Court may grant an amendment. It would be an extreme hardship if, by a slip of this kind, a party were obliged to discover the whole of his title, and set forth his deeds, as is here also prayed ; and so to expose himself to the attacks both of the plaintiffs and of every other person.

EYRE, Ch. B. A demurrer *ore tenus* is only allowed upon new grounds ; nor where a demurrer in paper, on the same point, has already been over-ruled.

Where, in a suit for tithes, the title to the rectory is in issue, to a cross bill praying a discovery of the title, the rector cannot demur, although no other title is set up.

If there were merits, one would be inclined to allow an amendment ; but what rational objection can the defendants have to say what is the nature of their title, when they must prove it in the other cause ?

It is difficult to draw a line in what cases a discovery ought to be granted ; as where the tenant is fearful of being harassed by different claimants of

the impropriation, Here the title is put in issue by the original suit, and therefore the plaintiffs are entitled to have a discovery of the nature of it. But the Court will exercise their discretion in allowing the plaintiffs to search into the title any further than for the purposes of the suit.

The rule laid down by Lord *Hardwicke* goes very far; and I should not be inclined to follow it to that extent, without examining further into the authority of the decision. But here the demurrer is bad upon other grounds, and it is unnecessary to go into that question.

THOMSON, B. The demurrer is bad, as covering too much. The defendants are bound to set forth, whether any payments of agistment tithe have been made by the predecessors of the plaintiffs in their farms.

The demurrer was over-ruled.

MYND v. FRANCIS.

Same day.

THIS was an amended bill, in which the plaintiff, as common informer, sued the defendant, the winner of money at play, on 9 *Ann. c. 14.* to have a discovery of the times of winning, the sums won, and of whom, &c. The defendant demurred (as to so much as had not been answered in the answer to

A bill by a common informer for discovery of money won at play will not lie, till he has commenced some suit for relief.

To an amended bill a demurrer as to so much as had not been answered in the answer to the original bill, is bad.

the original bill,) for want of interest in the plaintiffs; the bill not praying any relief, nor stating the plaintiff to have commenced any suit at law, nor even to have any intention so to do. It was therefore argued, that he had not entitled himself to the discovery sought, as the bill did not shew any purpose that could be answered by his obtaining it. *Debeig v. Lord Howe*, in Chancery, Hil. T. 1782. (cited in *Mitford* 151.)

Hall, for the plaintiff, contended, that if he had shewn his intention to sue, he would not have been bound to do so; and therefore this is like the common case of a bill of discovery before action brought; in all such cases it does not with certainty appear that any purpose will be answered by the discovery. The *Statutes* 9 *Ann.* c. 14. s. 3. and 18 *Geo.* 2. c. 34, seem to imply, that a bill for discovery will lie before any action brought. It is not in all cases necessary that an interest should have vested, in order to entitle the party to have a discovery: as where an executor does not prove the will, but takes out administration, a legatee may have a discovery of assets before probate.

ELYRE, Ch. B. Undoubtedly the plaintiff's averring his intention to sue could make no difference; but the case rests on other grounds; no clause in the act can authorize such an absurdity, as that a person may have a discovery, as common informer, before he has got that character by commencing his suit; if it did, a defendant might be harassed by an hundred bills of discovery, and the last plaintiff, seeking relief, would gain priority over them all, and render their discoveries useless.

The demurrer was however over-ruled on the point of form, in not expressing particularly the parts of the bill demurred to.

Johnson for the defendant.

MATHEWS v. LEWIS and Another.

27th April.

PARTRIDGE and *King* moved for a rule to shew cause why the judgments entered up by the plaintiffs should not be set aside on the ground of usury. It appeared by affidavits that the defendants being entitled to a large estate on the death of their grandmother, aged eighty-seven, and to considerable property in the funds on the death of their mother, but in great present distress for money, applied to one *Cree*, to procure them a loan of 1000*l.* He introduced them to one *Duppa*, a money-lender, and charged 100*l.* for procuration-money. *Duppa* agreed to get the money; said he got it from *Mathews*, and took to himself, as trustee for *Mathews*, their bonds to pay 2000*l.* on the death of either their mother or grandmother, together with warrants of attorney to confess judgments for that sum. The sum actually paid to the defendants was 650*l.*; 50*l.* being charged for drawing the deeds; 100*l.* to *Cree*, and 200*l.* kept back on other pretences. The defendants found this sum insufficient, and got other 600*l.* on nearly the same terms; the whole sum they received was 1250*l.* for which they gave

This Court will not set aside a judgment regularly entered up, on the ground of usury or extortion in obtaining it.

An extortioning post obit, however gross, cannot be considered as usury.

security for the payment of 3200*l.* on the above events. *Duppa* himself was the real lender, and the name of *Mathews* merely fictitious. The grandmother died in three months after these transactions, and judgments were entered up by *Duppa* on the warrants of attorney.

It was argued that the transaction was usurious, and the appearance of risk, depending on the lives of two old persons, a mere veil to hide its real nature. In *Cook v. Jones*, Cowp. 727. Lord Mansfield allowed such a motion as the present, and granted an issue to try whether the transaction was fair; and in *Richards qui tam v. Brown*, Cowp. 770. he held, that where the intention of one party is to borrow, and of the other to lend, the pretext of a colourable risk could not screen.

By the *Court*.—To set aside judgments of this kind, is to usurp the office of a Court of Equity by the summary jurisdiction of a Court of Law. It may be necessary at last to direct an issue to try the validity of the transaction, which a Court of Law cannot compel; and the introduction of this second innovation in the practice, rendered necessary by the first, shews how dangerous it is to confound the jurisdictions of the different Courts. The regular process of a Court of equity seems in every respect the best adapted to this case: the plaintiff is entitled in conscience to the money he has really advanced; if we set aside the judgment, he loses that with the rest: a Court of Equity, on the other hand, decrees what is really due, and no more. The Court of King's Bench has granted such motions; perhaps that is now become so much the

practice of the Court, as not to be disputed there; but, in this Court, no such precedent has been established, and we do not see any reason to make one. Besides, this is nothing like usury. It is a catching bargain, an extortioning *post obit*, but no usury.

The rule was refused.

The LONDON ASSURANCE COMPANY
v. HANKEY.

Same day.

THE plaintiffs were underwriters of a policy of assurance on a ship, of which the defendant was the owner. The ship was lost; and the defendant having commenced an action at law on the policy, the plaintiffs filed a bill in this Court, for a discovery whether the vessel was sea-worthy or not at the time of sailing. It prayed also a commission to examine witnesses in *Jamaica*, and an injunction in the mean time. The commission issued, and both sides examined witnesses under it. The plaintiffs in equity had a verdict at law.

The defendant having obtained an order for costs against the plaintiffs, as of course, upon bills of discovery,

Burton now moved to discharge that order, on the ground that the bill not being for discovery

only, but also for a commission to examine witnesses, and for an injunction, was out of the common case of mere bills of discovery. That the rule was a very hard one, and ought not to be extended, as it gives costs to the defendant for being prevented in the execution of a premeditated fraud.

EYRE, Ch. B. There is this further hardship in the case, that if a party unconscientiously obtains a judgment at law, and is afterwards brought here to make a discovery, he pays the costs of both proceedings; whereas, if the discovery is obtained before the expences at law are incurred, he gets his costs here. But there is reason in the difference; after obtaining a judgment against conscience, a party comes into a Court of Equity as a criminal, and is punished in costs; but till he has made use of unconscientious advantages, we cannot presume that he means to do so. The plaintiff has had the advantage of the discovery sought, and must pay for it. The injunction is a consequence of the discovery granted, and therefore the plaintiff must pay the costs of that also; but as both parties have had the benefit of the commission to examine witnesses, each must pay his own costs as to that part.

Steele, for the defendant, cited a similar case of *Pickersgill v. Vaneykellinburg*, lately in this Court, where the same rule as to the costs was followed.

BETWEEN

ANN MORSE and WILLIAM MORSE, Plaintiffs.

Same day.

AND

JOHN FAULKNER, JAMES SHADE, and MARY
his Wife, SAMUEL WARD, and HANNAH
his Wife, and ANN ROBINSON, Defendants.

THIS was a bill brought to compel the defendants to surrender the copyholds in question in favour of the plaintiffs, and that the plaintiffs might be quieted in their possession thereof, the defendants having recovered against them in ejectment. (*Vide 3 Term Rep. 365.*) The plaintiffs claimed under a surrender and conveyance from *William Robinson* in 1774. This *William Robinson* was son and heir of *Richard Robinson*, then deceased, who was the second nephew of *Thomas Giles*, the late owner of these copyholds. Some time after *Thomas Giles's* death, *William Robinson* claimed to be admitted tenant of these copyholds, as his heir, declaring that his uncle *Thomas Robinson*, the eldest nephew of *Thomas Giles*, was dead. Being accordingly admitted by the steward, he immediately sold the premises in the public house where he was admitted, and surrendered them in favour of the purchaser, *Richard Morse*, under whom the plaintiffs claim, and have been in possession ever since. In truth, *Thomas Robinson*, the eldest nephew and heir of *Thomas Giles*, was alive at the time of this surrender, but died afterwards in 1778, leaving his nephew, *William Robinson*, his heir at law, and then really entitled to the premises. *William Robinson* died in 1781, without having ever disturbed or confirmed

One erroneously believing himself entitled to a copyhold was admitted, and sold it; it afterwards descended to him; he died without perfecting the conveyance; this is a personal equity, and does not bind his heir. *Semb.*

the title of the plaintiffs. The defendants were his heirs at law, and also heirs of *Thomas Giles* and *Thomas Robinson*.

Partridge and *Coze*, for the plaintiffs.—Although the conveyance was defective, not being made by a person then in possession, and the legal doctrine of estoppel is therefore held by the Court of Law not to apply; yet this is a case in which equity will interfere. Where there is an agreement to convey, and a conveyance under it which is void, the agreement is not less valid than if it had remained executory. *Taylor v. Wheeler*, 2 Vern. 564. *Jennings v. Moore*, 2 Vern. 609. *Martin v. Seamore*, 1 Ca. in Ch. 170. If the plaintiffs had brought their bill against *William Robinson*, after the death of his uncle, to perfect the conveyance to them, he would have been compelled to do so; *Clayton v. The Duke of Newcastle*, 2 Ca. in Ch. 112. There can be no reason why his heir should not take subject to the same equity by which he himself was bound. The contrary has often been determined; *Hoskins v. Savoy*, 1 Eq. Ca. Abr. 265. ca. 4. 2 Eq. Ca. Abr. 54, 55. And this rule appears, by all the above cases, to apply to copyholds as well as freeholds; *Ca. Temp. Finch*, 272. A Court of Equity often confirms contracts made by parties who have not then any vested interest. *Wiseman v. Roper*, 1 Cha. Rep. 84. *Whitfield v. Fawcett*, 1 Vez. 387. So where there are articles to convey, the constant practice of Courts of Equity is to direct an inquiry, whether the party *can* make a good conveyance, not whether he could at the time of making the agreement. *Langford v. Pitt*, 2 P. Wms. 630.

Ainge, for the defendants, argued that they were entitled to claim immediately from *Thomas Giles* their ancestor, the person last seized ; for *Thomas Robinson* and *William Robinson* never having been admitted, or in possession, had no seisin through which their heirs could claim.

By the *Court*.—The law is clearly otherwise ; in copyholds the heir takes without actual admittance, and may surrender and convey without it, which he could not do if he were not seized ; but the lord is in that case entitled to the double fine on the surrender.

Ainge.—A specific performance of an agreement to convey is only decreed against the heir in those cases where the estate descended is legal assets, which copyholds are not.

By the *Court*.—After the many cases on the subject, it is too late to inquire into the power of Courts of Equity, to supply defective conveyances of copyholds against the heir, in general cases.

Ainge then argued, that this was a contract executed, and not executory ; that it was an agreement to bring the interest of the vendor in the premises, and there was no reason to presume that the sale was not to be subject to all chances.—He then read evidence to shew that this was the real nature of the transaction, that the price given was not the full value of the estate, and that the bargain was carried through with such indecent hurry as gave a strong suspicion of unfairness, and would prevent

the court from interfering.—And on these grounds the bill was dismissed.

ELYNE, Ch. B.—My opinion at present is against the plaintiff on the other ground also. It is clear that this conveyance, if a fair transaction, might have been enforced against *William Robinson* himself after the death of his uncle, but that has not been done. It is also clear, that where there is an agreement to convey, or a defective conveyance by a person then actually having title, that would be such an equity as would bind the lands in the hands of the heir. But there is no case produced, where a contract to convey, made by one not then entitled, has bound his heir. It rather seems to me that this is a personal equity, attaching on the conscience of the party, and not descending with the land. But I should not determine the case upon this ground without further consideration.

2d May.

BLACKET v. LANGLANDS.

Where a plea is a bar to the whole bill, if at all, an answer to any matters which ought to have been covered by the plea, overrules it.

THIS was a bill by the impropriate rector of the parish of for tithes. The defendants pleaded a title in themselves to the tithes of their farms, as lessees of Mr. *Errington*, under a grant of the rectory to his ancestors from Queen *Elizabeth*, the rectory having been vested in the Crown, upon the dissolution of the *Abbey of Herham*, the former impropriators. To this plea was

added an answer, denying the title of the plaintiff to the rectory.

It was objected, on the part of the plaintiff, that the plea did not set forth how the tithes of their farms had been separated from the rectory; and that as the title of the plaintiff to the rectory was not denied in the plea, it should be presumed that these tithes also belonged to him: and to this opinion the Court seemed to incline.

It was also objected that the answer over-ruled the plea; for although the title of the plaintiff and the other matters contained in the answer are not included in the introductory part of the plea, they ought to have been included in it: if the plea is a bar at all, it is a bar to these matters as much as to any other, and the Court will never permit the splitting the effect of the defence set up in the plea.

The Court were clearly of opinion with the plaintiff upon this objection, and the plea was ordered to stand for an answer.

Partridge and *Abbot* for the plaintiff: the Solicitor General, *Burton*, and *Romilly*, for the defendant.

Friday,
4th May.

JAMES SCOTT D. D. *v.* JAMES ALLGOOD & *al.*
ALLGOOD & *al.* *v.* Dr. SCOTT & *al.*
Duke of NORTHUMBERLAND *v.* Dr. SCOTT & *al.*
EDWARD CHARLTON & *al.* *v.* Dr. SCOTT & *al.*

A bill to establish a modus for every ancient farm, stating that the whole parish consisted of ancient farms, but not setting forth the abutments of each, is bad.

THE original bill was brought by Dr. *Scott*, as rector of the parish of *Symonburn* in *Northumberland*, for agistment tithes. The defendants, in their answer set up a modus of one penny for every ancient farm within the parish, in lieu of all tithes for grass. The other three bills were in the nature of cross bills, brought by the defendants to the former bill, and several other owners of farms within the parish, against the parson, the ordinary, and the patrons of the living, to establish the modus of one penny, called the hay penny, as a general modus throughout the parish, *for every ancient farm* within it (except one, and the rector's glebe,) in lieu of all sorts of grass in whatever way consumed.

The court had ordered all the causes to be consolidated.

The parish, which is very large, is divided into two districts, *Symonburn* and *Bellingham*. The plaintiffs, in one of the cross causes, averred, that the whole of the district of *Bellingham* (in which their property lay) was divided into ancient farms, which are not variable divisions, but fixed and invariable, and as well known as the bounds of the parish itself; the ancient farm still continuing, by reputation, the same, however it may be split into

parcels, or whatever additions the proprietor may acquire in the neighbourhood. And that by prescription these farms were free of tithes of all grass on paying the hay penny for each.

In *Symonburn*, besides these farms, there were commons on which the owners of the farms had right of common; and also considerable parts of these commons which had from time to time been added by allotments by various means to the several farms.

Dr. *Scott* did not admit, in his answer, that these farms and commons comprehended the whole parish, nor that they were well known and unvariable divisions of the country; but admitted that one penny was due as a modus from each ancient farm, or some part thereof, but said that that extended only to hay, and not to grass.

When that part of the cross bill was read, which described the lands in respect of which the modus of the hay penny was said to be due, *Burton*, on behalf of Dr. *Scott*, objected, that the description of the lands was not sufficiently certain; only shewing that each plaintiff claimed in right of his ancient farm; without shewing the abuttals, or even the computed extent of each; and argued, that it is necessary in establishing a modus, which is not a general parochial modus, but for each farm, to state accurately the place to be covered by it; for otherwise when a farm comes to be divided, it would be impossible to say whether each part was covered by the modus,

or not. The use of a bill to establish a modus, is to settle the dispute; but if it is not certainly shewn what lands are to be covered by the modus, the successors of *Dr. Scott* would not be benefited by a decree: and each individual owner of lands might dispute whether the decree bound his lands.

The *Solicitor General*, *Newnham*, *Hollist*, and *Romilly*, on the other side.—*Dr. Scott* has admitted the modus as to the lands covered by it, and the only dispute is, what produce of these farms is covered by the modus; in every general modus it is competent to dispute whose, and what lands are within it.

In this case, the Plaintiffs, in one of the cross causes, have averred *Bellingham* to consist entirely of ancient farms, and therefore, as to that district, the modus is sufficiently stated, as comprehending the whole district; and the circumstance of the Court having consolidated the different actions, cannot prejudice their right.

As to *Symonburn*, it is stated to consist only of ancient farms and commons; and part of the merits in the cause are, that the plaintiffs contend that the modus for each farm covers the common appendant thereto; and till that is determined against them, it must be so taken; and then, as to that district also, the whole is covered by the modus.

When the Court, at the request of *Dr. Scott*, consolidated the causes, it must have been on the

ground that this was one general right; for otherwise each plaintiff ought to stand on his own separate claim of exemption from tithes.

An owner of an ancient orchard may establish a modus for all ancient orchards; and it is not necessary, in order to do so, to set out the abutments of each orchard. Of those not belonging to the plaintiff it would be impossible, and if they did, it would neither bind the parson nor the landholder as to the extent; for that is not a general right, and cannot be brought in question but by the owner. Even of his own, it is useless; for if necessary, it must be so on the ground that if the farms are not particularly described, there is not sufficient certainty what is covered by the modus; and therefore that those not so described, would not be protected by the decree. This would be in effect to make each owner of lands bring a bill to establish the general modus, in order to protect his own separate property. It is not according to strict rule, to allow the right of any man to be bound by a decision to which he is not a party; but yet a bill by a few to establish a general right, is allowed for general convenience, and this applies equally, both in reason and in law, whether the modus is claimed for every acre of orchard or for each ancient orchard: and so as to farms, it is still a general right, though attaching on each separately, and therefore a claim of modus for the whole should be admitted.

As to the objection, that the parson would not know to whom to resort for his modus, that is settled by the case of *Hardcastle and Sclater*, 3 Atk.

245. and 1 Ambler 41. by which it is ruled, that any one holder of lands subject to the modus may be called upon to pay the whole. Suppose the boundaries of these antient farms at some future time to become uncertain, at least some part of each will remain certain, and then the parson is secured in his modus, though the tenant, from whom he receives it, may find a difficulty in recovering his proportion from his companions. The parson is in this case fully more secured as to the identity of places liable, than in the case of ancient orchards; for new orchards, or additions to the old, would not be protected by the modus, and it would be impossible, in a length of time, to distinguish the one from the other. That case also shews, that it is not necessary to set out the abutments of the demesne lands of the rector excepted out of the modus, and as uncertainty in the place excepted, implies uncertainty in the place covered by the modus, that is exactly the present case.

As to the argument, that the ancient farms cannot be taken to be fixed divisions of the country, because *Dr. Scott* has not in his answer admitted them to be so; at least the parishioners have charged that fact in their bill, and if it is not admitted, it is a proper subject for an issue, as being a material fact in the cause.

Though a decree in this case would not bind any lands in the parish, so as to be conclusive evidence of their being within the modus, yet it will prevent litigation, which is the great object of this sort of bill. For if the plaintiffs are allowed to establish

this modus, the issue hereafter in any dispute between a landholder and the parson would be, whether ancient farm or not; whereas, if the modus is not established, there will be two grounds of litigation; first, what rights attach on ancient farms? second, whether the lands in question are ancient farms or not? When any general rule is established, it is competent to contend whether the party is within it or not; yet certainly the establishing general rules prevents disputes. The highest inconvenience will result to the parson in the dismissing this bill, for then each individual land-holder must bring his separate bill to establish the modus.

Burton, Abbot, and Roupel, on the other side.

EYRE, Chief Baron.—The difficulty in this case is, to make such a decree as the successors of *Dr. Scott* and of the parishioners for ever may take advantage of; and that can only be done by having certainty in the modus established, and in the places covered by it. In a proper parochial modus this question cannot arise; neither does the same difficulty present itself in regard to ancient orchards, for in these the denomination is a sort of description. When these farms come to be divided more and more, and it becomes uncertain which part was held by each of the present plaintiffs in 1792, the modus will be as unsettled as ever; and then, if the parson demands the modus, it will be refused, on the ground that that farm is not ancient; if he takes in kind, trespass will lie against him. It will be impossible to determine to what ancient farm each

acre belongs. The difficulty arising from a number of actions being brought, if the modus is not established, is in the nature of the case, and cannot be avoided.

The other Barons assenting, the cross bills were dismissed.

The parties afterwards came to a compromise upon the original bill.

2d May.

DARKIN v. MARYE.

JONES moved, on behalf of *A. Darkin*, that he might be at liberty to pay into Court one moiety of the purchase money of lot 1. of the articles sold under the decree in this cause, the lot having been purchased jointly by him and *J. Toplis*.

The *Court* refused to permit him to do so, from the confusion that might ensue; the purchase being entire.

GOSSLEY v. BARLOW.

Tuesday,
8th May.

MR. Serjeant *Lawrence* had, on a former day, obtained a rule to shew cause why a new trial should not be granted in this case, upon the ground of the verdict for the defendant being against evidence. This was an action of trespass, brought by the plaintiff, as owner of the ship *Goodwill*, against the defendant, a captain in the navy, who, as an officer of the customs, seized the said ship, and has detained her ever since.

The statutes 24 Geo. III. c. 47, and 27 Geo. III. c. 39, do not so clearly mark the distinctions between the different sorts of vessels there enumerated, as to supersede evidence upon it.

In the 24 Geo. III. c. 47, § 4, the word *built* does not apply to the shape of the hull alone. *Semb.*

It appeared from the notes of the Judge who tried the cause (Mr. Justice *Heath*), that this was a coasting vessel, laden with coals and other lawful merchandize; she was clench built, and had a running bowsprit, but carried the tonnage she measured. The defendant searched her at sea for spirits; but finding none there, he brought her into port, and unloaded her cargo; finding nothing, he offered next day to let her go, on the plaintiff giving him a release. The plaintiff refusing to do so, she has been detained by the defendant ever since, on the ground that her licence was void.

Whether a licence for a ship "to be employed in the coasting trade," is good? *Quære.*

The licence had been granted by the proper officer at the port of *Rye*, who had been a shoemaker, and acknowledged he did not understand the distinctions between vessels of different sorts. The licence described her as a sloop; and was not "between any two or more ports," according to the

directions of the statute, but generally, “ *to be employed in the coasting trade.*”

The defendant brought a great deal of evidence to prove that she was a *cutter*, and not a *sloop*, as described; that the distinction between a sloop and a cutter consists chiefly in the *rigging*; sloops, which are built for burthen, have square rigging, and standing bowsprits; whereas cutters are meant for velocity, and have running bowsprits, and running jibs. Others of his witnesses also said, that the being clench built distinguishes a cutter from a sloop, which is carvel bottomed.

On the other side, many witnesses, ship builders and others, swore, that the distinction between a cutter and a sloop was, that the latter, being intended to carry burthen, is more round in the body, *carries the full burthen she measures*, as the vessel in question; whereas a cutter, being more pointed and acute in the shape of her body, in order to gain speed, does not carry so much as she measures; that the distinctions in the rigging, and in being clench or carvel built, are often used indiscriminately by cutters and sloops.

The Judge summed up strongly in favour of the plaintiff, chiefly on the ground that her being described a sloop by the officer of the crown appointed for that purpose ought to be conclusive. The jury however gave a verdict for the defendant.—The Judge certified, that it was against his opinion.

Cause was now shewn by *Morris*, Serjeant *Rook*, *Litchfield*, and *Dallas*, against the rule.—Being informed by the Court, that it would be improper to argue the strength of evidence, after the opinion in the Judge's note, it being pretty much of course to grant a new trial on the report of the Judge, unless he appear to have acted from a misapprehension of the law; they now contended that the distinctions sworn to by the defendant's witnesses, and followed by the jury, were recognized by the statutes on this subject, which therefore precluded all other evidence.

By statute 24 Geo. III. c. 47: sec. 4. it is enacted,
 “ That all vessels belonging in whole, or in part,
 “ to any of his majesty's subjects, called *cutters*,
 “ luggers, shallops, or wherries, (*of what built*
 “ *scover,*) and all vessels belonging as aforesaid, of
 “ any other description, *whose bottoms are clench*
 “ *work*, unless they shall be square rigged, or *fitted*
 “ *as sloops with standing bowsprits*, &c. shall be
 “ forfeited, &c.”

Sec. 7. “ Provided always, and it is hereby
 “ further enacted by the authority aforesaid, that
 “ nothing in this act shall extend, &c. to any vessel
 “ whatsoever, the owner of which shall have a
 “ licence as hereafter described and directed, for
 “ navigating the same, from the Lord High Ad-
 “ miral of *Great Britain*, or the Commissioners of
 “ the Admiralty for the time being, or any per-
 “ son authorized by them to grant the same, for
 “ and on account of *her built*, &c.”

CASES IN THE EXCHEQUER,

Sec. 10. " And be it further enacted that each
 " and every licence shall specify the tonnage of
 " such ship or vessel, and describe whether she is
 " a *cutter*, lugger, shallop, or wherry, or *what sort*
 " of *built* she is, and who are the owners thereof,
 " and for what port, harbour, or creek, she is
 " about to sail, &c."

The statute 27 Geo. III. c. 32. sec. 1. after reciting the above act, and the 4th section thereof, recites
 " And whereas it is expedient that further provision
 " should be made, in regard to such vessels as are
 " particularly described in the before-recited act,
 " and that the said recited act should be extended
 " to other vessels not coming or falling under the
 " descriptions of such vessels or boats as in the said
 " before-recited act are described ; be it therefore
 " enacted, &c. that from and after the first day of
 " *June* 1787, in case any *cutter*, lugger, shallop,
 " wherry, *sloop*, smack, or yawl, belonging in
 " whole, or in part, to any of his majesty's sub-
 " jects, shall be found within the limits of any part
 " of this kingdom, or within four leagues of the
 " coast thereof, having a bowsprit which shall ex-
 " ceed in length more than two-thirds of the length
 " of such *cutter*, &c. from the fore part of her
 " stem, to the aft side of the stern post aloft,
 " (whether the same shall be a *standing or running*
 " *bowsprit*,) every such *cutter*, &c. shall be for-
 " feited, &c."

Sec. 4. " Provided always, and it is hereby
 " further enacted by the authority aforesaid, that
 " nothing in this act shall extend, or be construed

“ to extend, to forfeit, &c. any *cutter*, shallop,
“ lugger, wherry, *sloop*, smack, or yawl, nor any
“ vessel whatever, the owner or owners of which
“ shall have a licence for navigating the same
“ from the Lord High Admiral of *Great Britain*,
“ or the Lords Commissioners of the Admiralty,
“ for the time being, agreeable to the rules, regu-
“ lations, and conditions of the herein-before
“ recited act.”

They argued that these statutes are legislative declarations of the distinction between sloops and cutters. The words in 24 *Geo. III. c. 47. sec. 4.* “ *Cutters, &c. (of what built soever,)*” shew that the *built*, i. e. the shape of the hull, is not essential to its being cutter or not; and the words following, “ *And all vessels of any other description, whose bottoms are clench work,*” imply that the cutters, luggers, &c. are also clench work; and that these described, with the general clause of all other vessels whose bottoms are clench work, are meant to comprehend every sort of vessels clench built, those described by name being the most common of that built.—These are all forfeited, “ unless “ they shall be square rigged, or *fitted as sloops with standing bowsprits.*” This sufficiently shews the meaning of the legislature to be, that all vessels not coming within the definition of sloops as to their bottoms, or resembling them in their rigging, by having standing bowsprits, are to be forfeited. The act of 27 *Geo. III.* relating to all vessels whose bowsprits are of a certain length, whether standing or not, includes sloops; but in the former statute, where

having standing bowsprits is an exception, sloops are not included.

A sloop, which is a vessel carvel bottomed, and with a standing bowsprit, needs no licence; for there is no danger of their smuggling, from their slowness.—So a vessel resembling a sloop in either of these particulars, is protected without a licence. If then this vessel had really been a sloop, as she is described, she would have required no licence.

The 7th section gives an exemption only in favour of every vessel “the owner of which shall have a licence as herein-after described.” The 10th section requires, that each licence shall describe whether she is a *cutter*, lugger, shallop, or wherry, or *what sort of built* she is. If she is a cutter and is described as a sloop, she has not such a licence as is required, nor therefore such as will protect her. The owner, in making his representation of the nature of his vessel, has, in the 10th section, his option given him, either to describe her generally as a cutter, or lugger, &c. or to specify particularly her construction: the owner in this case has chosen the former; he has given a false description, which therefore does not cover his vessel from the penalties.

The word “built,” in the 10th section, must either relate to the distinction between clench and carvel work, or to the general construction, including the rigging, bowsprit, &c. This cannot refer to the shape of the hull, for that is no where, in

either of the statutes, taken notice of as the description of those slow sailing vessels, which are exempted from the necessity of getting licences.

It is necessary that the description in the licence should agree with the truth, for otherwise custom-house officers would be continually led into mistakes, and afterwards harassed by prosecutions. Besides, if the licence of a sloop will cover a cutter from forfeiture, the consequence would be dangerous; as a sloop might obtain a licence and transfer it to a cutter, and while the sloop continued to trade securely, from her built, without any licence on board, the cutter would perhaps be carrying on a smuggling trade with all the advantages of a licence, and without danger of forfeiting the security given on obtaining the licence, according to the 10th section (24 Geo. III.), which would still continue to attach upon the sloop, for which it was originally given.

They also took another objection to the licence, that it stated the vessel as intended to be employed *in the coasting trade generally*, without stating to what "*port, harbour, or creek, she is about to sail,*" according to the directions of the act. This omission they contended avoided the licence, which therefore was no security from the penalty or forfeiture in the act.

If a new trial is granted, it can be of no use but to increase expences; for there are at least sufficient grounds for the Judge to certify that there was probable cause for seizure, and in that case only the

value of the ship can be recovered, without other damages or costs: the defendant is now ready to return the vessel, each party paying their costs, and offered to return her on the second day after she was brought into port; so that the plaintiff may have without a new trial, all he can hope for by one.

Mr. Serjeant *Lawrence*, and Mr. *Gibbs* in support of the rule argued, that the construction put upon the acts by the defendant's counsel was fallacious, the words in the 4th section (24 Geo. III.) "cutters, &c. *unless they shall be square rigged or fitted with standing bowsprits,*" would be absurd, if a standing bowsprit and square rigging constituted a sloop; for that would be making a forfeiture of all cutters, unless they shall be sloops. The words "fitted as sloops with standing bowsprits," do not mean, fitted with standing bowsprits as sloops are fitted, but fitted like those sloops which have standing bowsprits.

In the 7th section the licence is said to be on account of the *built*, which shews the meaning of the legislature. And in the 10th section, which requires that the licence shall describe, whether she is a cutter, &c. or what sort of *built* she is, means, that the built shall be described in this general way; that is to say, whether *cutter*, *lugger*, &c. or any other description of *built*; the *built* being evidently the thing to be distinguished, and which the legislature supposes distinguished, by the word *cutter*, *lugger*, &c. or as here by the word *sloop*.

It would be an unnatural construction to say that the word *built* meant the *rigging*, and the evidence to which the Judge at the trial gave credit, sufficiently proves that it is not the technical use of the word.

The words in the act 27 Geo. III. where both cutters and sloops are forfeited, "having bowsprits above a certain length, whether the same shall be a running or standing bowsprit," would be unnecessary, if these were known and certain distinctions between cutters and sloops; but are useful and effectual words, if cutters and sloops may use either sort of bowsprit indifferently: and the 4th section of the same act supposes, that a sloop may have required a licence under the former act.

It is not the owner of the vessel, but the King's officer, who certifies to the Admiralty the built of the vessel for obtaining a licence; and even if he had made a mistake, that ought not to prejudice the plaintiff. It is equally advantageous to an owner to have his vessel described as a sloop or as a cutter if he has a licence, and it is equally easy to get one for either; therefore we cannot suppose any interest in the plaintiff to have it described wrong; and it is impossible that the act of any king's officer should forfeit to the king a fair trader under an act against smuggling.

The other question, as to the destination, was properly laid aside at the trial, as having nothing in it; for if the licence had mentioned each port at which a vessel may call in the coasting trade, that would certainly be good: and where this licence

says generally, "*to be employed in the coasting trade,*" it means to include all the ports in *England*; which is the same thing as if it specified every one. This is the general mode of granting licences to coasters; and if bad, half the coasting vessels are liable to be forfeited; and all requiring licences must leave that trade, as it is impossible to apply for a licence every time they run from one creek to the next.

ERLE, Chief Baron.—The principal difficulty in this case arises from the equivocal expressions in the act of parliament 24 Geo. III. The 4th clause seems to favour the construction put by the defendant's counsel; but that construction seems at first to be negatived by the word *built*, used in the 10th clause.—Upon consideration, we are all of opinion that that word is there intended to be used as synonymous with description, and not to imply that the body is the distinguishing part. If the word "*description*" had been used, it would have cleared all difficulties, but as it stands, we do not think it sufficiently plain to contradict the parole evidence to which the Judge gave credit.

As to the other objection, to the uncertainty of her destination in the licence, that has more weight. The words, "*what port, harbour, or creek,*" are very express; and although the argument used by the plaintiff's counsel is true, that if vessels requiring a licence must have a fresh one for every trip in the coasting trade, it would effectually prevent them from engaging in it, yet it does not follow that that was not the intent of the legislature; for the requiring licences at all, shews a jealousy

of allowing the vessels which are fit for smuggling to be hovering about the coast, and the licensing them for a voyage seems rather intended not to deprive them of advantages on any particular emergency, than to allow them the benefit of a general coasting trade.

This however, is a thing of very great importance, as it is the general mode of granting licences in the trade; and a multitude of vessels would fall within the penalty if we were to decide for the defendant. It is proper, on this ground also, that there be a new trial, that the case may be put upon record, and receive the most solemn decision it is capable of.

As to the objection, that it would only be to increase the costs of both, as there is a probable cause of seizure, that is not true. The certificate to be granted by the Judge, is only in cases where a well-meaning officer has been led to make a seizure, by a probable cause of suspicion, in which he afterwards finds himself mistaken: but the defendant seized on other grounds, where he had not even a probable cause for suspicion; he fell on the present ground of defence afterwards, as a pretext for retaining the seizure, and was so conscious he was wrong, that he offered to let her go upon getting a release; that is, if the plaintiff would give up his right to redress, for the injury he had sustained.—He stands on the strict letter, and is not entitled to any favour.

The rule was made absolute.

Monday,
12th May 1792,

MUSPRAT v. GORDON and Ux.

A. devised the residue of his property to his wife, in trust, to divide it among their children in such manner as they should deserve.

One of these seven children sold her share, and covenanted to make it up a full seventh. This is good; and on a bill for a specific performance, she can make a good conveyance without the mother joining.

THIS case came on upon exceptions to the Deputy Remembrancer's report, upon its being referred to him to enquire whether the defendants could make a good conveyance to the plaintiff.

The defendant *Ann* was one of the seven children of *Lewis Brown* deceased, who, upon his death, devised certain estates to his wife, in trust to sell, and after payment of debts, to invest the surplus in government securities for the maintenance of his children while minors, and to divide the residue among them "in such manner as they should deserve." The premises in question were not sold according to the trust, but leased by the widow to the plaintiff, who laid out considerable sums in improving them. Being afterwards threatened by the defendants to be turned out, and finding his title defective, he came to an agreement with them, by which, after reciting the title of the defendants under the will, they, for 320*l.* agreed to convey to the plaintiff all the present interest of the wife in the money to arise from the sale of the premises; and that if the share should not amount to a full seventh of the residuum, they should make it up. The defendant sued at law for the 320*l.* The present bill was brought to have an injunction against proceeding at law, till the conveyances were made out to the plaintiff; and it was accordingly referred

to the Deputy Remembrancer, to see whether the defendants could make a good title: he reported, that they could not, without the mother's joining in the conveyance. Exceptions being taken to this report;

Burton and *Stanley*, for the defendants, insisted, that the matter referred was not whether the defendant could make out a good title to the premises or freehold, but to the wife's interest in the money to arise from the sale; and this is a real vested interest, for the widow has the power of unequal division, but not of leaving any child unprovided for. The plaintiff made the agreement with his eyes open, and it recites the whole interest of the wife.—They cited 2 *Eq. Ca. Abr.* p. 21. ca. 19. 2 *P. Wms.* 182, 187. *S. C.* and 1 *Vezev*, 409, to shew that Courts of Equity will interfere to decree execution of agreements entered into bonâ fide for the purchase of possibilities even more remote than the present.

Richards and *Jones*, on the other side, contended, that this was such a bargain as could not be executed without the mother's conveyance, as otherwise the defendant had no certain interest to convey; it depending entirely upon her, what part, or whether any, would come to *Mrs. Gordon*; and as the debts were to be first paid, it was a chance whether there would be any surplus to divide; and as the defendant has sued at law for the 320*l.* which he must recover, the agreement being under seal, this Court should interfere, on the same grounds as would have led them to refuse putting it in

execution, if the defendant had prayed specific performance. General policy is very much against such bargains, as the mother will of course appoint nothing to Mrs. *Gordon*, when it is not for her own benefit.

EYRE, Chief Baron.—The same reasons which induce a Court of Equity not to decree specific performance, will not always lead them to avoid a contract executed, or stop proceedings at law upon it: but this contract is of a nature to be enforced in any shape; for the possibility may be assigned, and there is no appearance of fraud: besides, if the share appointed by the mother is deficient, the defendant is to make it up to a full seventh; which makes it nearly a certainty. The exceptions must be allowed; but without costs, as these bargains are not to be encouraged; and the case referred back to the Deputy Remembrancer, to say, what sort of conveyance should be given.

18th May.

WILLIS v. DANIEL.

On an injunction obtained, the Court will not discharge the party out of custody, if taken on legal process.

Where a party is taken after

THE plaintiff, having obtained an injunction against the proceedings at law, was taken into custody on a *Capias ad Satisfaciendum*, before notice given to the other party of the injunction having been allowed: it was now moved, by *Lewis*, that he might be discharged out of cus-

today, and the case compared to a writ of error, which relates back to the time of its being allowed, although the party may be taken in execution before the other had notice; and although there is no contempt in taking the plaintiff, there is, in detaining him after notice.

he has obtained an injunction; but before notice given of it, the detaining him after notice is no contempt.

By the *Court*.—Equity cannot interfere to avoid process at law legally issued, as a writ of error does: we can only act upon the defendant personally, to punish him for contempt of the Court, if you can bring it to a case of that kind.

BULKELEY v. DUNBAR and Others.

Same day.

THE bill stated, that one *Valentine*, the agent in *London* for the plaintiffs (merchants at *Lincoln*), having received bills from them, to be by him indorsed on their account as required, was, by menaces, compelled to indorse them to the defendants for a debt of his own. The bill prayed a discovery of these matters, and that the notes might be delivered up. The defendant, *Dunbar*, in his answer said, that he had only acted as agent for the defendant *Duff*, and disclaimed having any thing in the notes; and therefore insisted on being struck out as a party; and only examined as a witness. Exceptions to this answer were taken, and allowed.

An agent, charged with personal fraud, cannot, by disclaiming interest, avoid answering fully.

By the *Court*.—When an agent commits a fraud, he is answerable, as principal, to the person injured, who is not to be sent round to seek the party benefited by the fraud. If the money or notes had been received *bond fide* by the agent, and he had paid it over before action brought, that would have been a good defence; but here there is a direct charge of fraud, which must be answered. And this is not such a criminal charge as will screen him from the discovery sought.

Same day.

TYE v. SAUNDERS and Others.

In an action against revenue officers, they had judgment, and the plaintiff was taken in execution for the treble costs; on a review of the taxation the treble costs were disallowed, (and the single costs not being taxed) he was discharged; he was afterwards taken on a *Ca. Sa.* for the single costs: this was held regular.

THE defendants had judgment, as in case of a nonsuit; and, as officers of excise, had treble costs taxed. The plaintiff, having brought a writ of error which was non-prossed, was taken in execution for costs of the whole. Afterwards the plaintiff obtained an order in this Court for a stay of proceedings till taxation should be reviewed. Upon a review of taxation, it appeared to be a cause where only single costs were given, and they were accordingly reduced, and the plaintiff discharged out of custody, the counsel for the defendant waiving the affirmance in error. The plaintiff refusing to pay the single costs, a *Capias ad Satisfaciendum* issued, and he was taken in execution, which the Court held regular, though it was contended that he had already been in custody for the

same duty, and having been discharged, could not again be taken.

Burton and Steele for the plaintiff: *Partridge and Pemberton* for the defendants.

By the *Court*.—After the granting the order to review taxation and stay proceedings, the effect of the former *Capias* was suspended; and as the single costs were not then taxed, there was no ground for detaining him then; but if the single costs had been taxed before his discharge, he should have been detained till paying them; and then a discharge would have prevented his being again taken.

The ATTORNEY GENERAL v. The CAST-PLATE GLASS COMPANY. *Same day.*

ON this information a verdict was found against the defendants, who now moved to set it aside and obtain a new trial, on the ground of misdirection of the Judge.

The 27 Geo. III. c. 28. s. 5. by the word square, means all rectangular figures only.

The case turned upon the interpretation of the statute 27 *Geo. III. c. 28.* whereby it is enacted,

No evidence of the technical meaning of the word in the trade, can be admitted to explain the statute.

Section 5. “That in lieu of the duty of excise, “now chargeable and payable for or in respect of any “materials, or metal, or other preparations made

“ use of in *Great Britain*, in the making of cast-
“ plate glass, there shall be paid to his majesty,
“ his heirs and successors, at and after the rate of
“ one pound one shilling and five pence halfpenny
“ per hundred weight for all cast plate glass which
“ shall be made in *Great Britain*, and which shall
“ be *squared* into plates of a superficies not less
“ than 1485 inches, and of a thickness according
“ to their superficies as hereinafter mentioned and
“ described.”

Section 7. “ And be it further enacted by the
“ authority aforesaid, that all and every maker and
“ makers of cast-plate glass shall, before he, she,
“ or they shall begin to draw any cast-plate glass
“ out of his, her, or their annealing arch, give
“ to the officer of excise, under whose survey such
“ maker or makers shall then be, six hours notice,
“ in writing, within the limits of the chief office
“ of excise in *London*, and twelve hours notice, in
“ writing, in other places of *Great Britain*, of his,
“ her, or their intention to draw any cast-plate
“ glass out of his, her, or their annealing arch;
“ and such officer shall attend to see such cast-
“ plate glass drawn out of the annealing arch; and
“ such maker or makers shall immediately, on any
“ such cast-plate glass being so drawn out of the
“ annealing arch in the presence of such officer,
“ proceed to square all such cast-plate glass; and
“ such cast-plate glass, immediately on the same
“ being so squared, shall, together with the cullett
“ arising from the squaring thereof, be weighed
“ in the presence of such officer.”

Section 10. “ And be it further enacted by the
“ authority aforesaid, that all and every maker or
“ makers of cast-plate glass, shall break into small
“ pieces, to the satisfaction of the officer of excise
“ under whose survey such maker or makers shall
“ be, immediately upon being requested so to do
“ by such officer, all cast-plate and all cullett
“ which shall not be squared into plates, accord-
“ ing to the directions of this act, so as to render
“ such glass and cullett unfit for any purpose but
“ that of remelting; and if any such maker or
“ makers shall neglect or refuse so to do, he, she,
“ or they shall, for each and every such offence,
“ forfeit the sum of fifty pounds.”

The five plates in question were made by the defendants, with oval tops, and as this was the shape in which they were intended for sale, they refused to square them, as the officer desired, by making them rectangular; and accordingly this information was filed against them, for the penalties in the tenth section.

The *Attorney General*, at the trial, produced books explaining the process and terms of art in the manufacture; and the defendants offered evidence to prove, that the technical meaning of the word *squaring* glass, is the cutting it into the shape in which it is intended for the market, whatever that shape may be; and on this evidence being refused, and a verdict directed and found against the defendants, the present motion was made for a new trial.

EYRE, Chief Baron.—In explaining an act of parliament, it is impossible to contend, that evidence should be admitted; for that would be to make it a question of fact, in place of a question of law. The judge is to direct the jury as to the point of law, and in doing so, must form his judgment of the meaning of the legislature in the same manner as if it had come before him by demurrer, where no evidence could be admitted. Yet on demurrer, a Judge may well inform himself from dictionaries or books on the particular subject concerning the meaning of any word. If he does so at *Nisi Prius*, and shews them to the jury, they are not to be considered as evidence, but only as the grounds on which the Judge has formed his opinion, as if he were to cite any authorities for the point of law he lays down.

I have no doubt in saying, that the legislature used the word "square," not in the strict, but in the common acceptation, confining it to rectangular, but nor to equilateral figures. Had they said, that the plates should be measured by *square inches*, the interpretation put upon the statute by the defendants would have been just; for any shape may in measurement be reduced to square inches; but they have said that it shall be *squared*, which cannot be applied to oval or irregular figures. Whether it would have been more beneficial to have allowed the manufacturer to have used all shapes, is not a question for a Court of Law.

The other *Barons* being of the same opinion, the rule was discharged

AYLETT v. BENNETT.

Same day.

THIS was a bill for an injunction against proceeding at law on a bond; stating it to have been given upon an agreement on the plaintiff's marriage, by which 200l. was to be secured to the plaintiff, by a promissory note from the defendant at two years date. The note was given, but without a proper stamp. The plaintiff prayed that he might have a valid note of the same import made to him before execution should be had on the bond.

Where the plaintiff had received a promissory note without a stamp, the Court directed a proper note to be made, conformable to the agreement between the parties, before the defendant was permitted to take out execution on a bond for which this note was part of the consideration.

The answer admitted the other facts, but said that the agreement was not to pay the 200l. in all events, as mentioned in the void note, but to settle it on the marriage in two years, if they should then be in want of it.—The cause came to a hearing on this answer.

Partridge, for the plaintiff, now contended that he was entitled to have his part of the agreement legally secured to him, before paying the bond, and that the void note was at least evidence of the intent of the parties to make the defendant absolutely liable for the money: and this is substantially admitted by the answer; for a promise to pay if the plaintiff shall want it, is in fact a promise to pay on demand.

Graham and Johnson, for the defendant. In this stage the answer must be taken for true. The pre-

sent demand is either on the ground of having an unstamped note, and therefore being entitled to a valid one, or it is on the fact of the agreement. The former ground is untenable, for that would be making a Court of Equity enforce payment of a note void by the statute. Neither can it be evidence of a valid agreement, for that would be doing the same thing by another name, and encouraging parties to seek payment in equity, instead of paying the penalty or having their notes stampd. If the plaintiff claims under the agreement, as stated in the answer, that we are ready to perform; but it will materially vary from the former note, being to be settled on the marriage, and that only in case they shall want it.

The Court held clearly, that an agreement to pay, if the plaintiff shall want it, is in substance an absolute undertaking; but that he was only entitled to have a security according to the agreement admitted, to be settled on the husband and wife, which materially varies from the note given.

The plaintiff not choosing to have it settled, the bill was dismissed.

GOSSLEY v. BARLOW.

Saturday,
19th May.

THE new trial having been granted in this cause, costs were given to the defendant on *Morris's* suggestion, that that was the practice of the Courts in similar cases. Some doubts having arisen, the *Lord Chief Baron* this day informed the Counsel, that he had talked with the two *Chief Justices* upon the point, and they agreed, that there is no general rule or practice against giving costs on new trials, because of the opinion of the Judge being different from that of the Jury, in cases where it was the province of the Jury to determine; especially where there is evidence on both sides: but the Barons having inclined to the opinion of the Jury, leaves no doubt of the propriety of the order in the present case.

There is no rule against giving costs on a new trial being granted, although the verdict was against the opinion of the Judge.

VINCENT v. BRADY.

Same day.

THIS was an action of debt on the recognizance of bail entered into by the defendant for one *Nicholas Brady*, in an action in the Court of *Common Pleas*, in which judgment was obtained by the plaintiff. A *Capias ad Satisfaciendum* issued, and was returned *non est inventus*. The plaintiff, on the second day after this return, put the recognizance

Where a recognizance of bail in C. B. is put in suit here, the plaintiff cannot have any advantage which he would not have had by the rules of C. B.

in suit in this Court, by serving the defendant with process.

On this ground, the defendant had obtained a rule to shew cause why the proceedings should not be stayed, on an affidavit that by the rules of the Court of Common Pleas, process cannot issue on the recognizance of bail, till the *quarto die post* of the return of the *Capias*; whereas in this Court it may issue immediately. The defendant surrendered his principal on the first day of this term; the process against him having been returnable last term.—But if the plaintiff had waited till the *quarto die post* of the return of the *Capias*, according to the rules of the Court of Common Pleas, the process could not have been made returnable till this term; and so the defendant would have been in time.

Laws shewed cause against the rule. In strictness of law, the bail are fixed on the return of the *Capias ad Satisfaciendum*, and the subsequent time for surrendering is only an indulgence of the Courts, and differs in each; neither Court being at all bound by the rules of the others.—But in either way of computing the time, the defendant is too late; if four days are given after the return of the process, in place of the four that in the other Court would have been required before it issued, still the defendant is too late; and a render in the right time is necessary, in order to obtain the indulgence of the Court; and if prevented by the death of the principal, it cannot be cured. *Filewood v. Popplewell*, 2 Wils. 65. *Parry v. Berry*,

2 Ld. *Raym.* 1452.—Besides they have appeared, which cures all errors in process.

Rous and *Marryatt* for the plaintiff.—The rules of Court are the law of the land as to those points.—We are entitled to the same advantages which we should have had, if the rule of Court had been strictly observed.

EYRE, Chief Baron.—The meaning of a recognizance in the Court of Common Pleas is, that the principal shall be rendered within the *quarto die post* of the return of process issued after the appearance day of the *Capias ad Satisfaciendum*. If this had appeared on the face of the recognizance, this question could not have been made; and as this recognizance refers to the suit there, it must be construed according to its meaning in the Court in which it was taken.—If we acted otherwise, it would be an encouragement to all unfair practisers to come into this Court, in similar cases, in order to escape from the rules of the other Courts.

THOMSON, Baron.—The proper practice is to proceed on a recognizance in the Court having the original suit, as it must be best acquainted with its own rules; but if other Courts take cognizance of the suit, they are at least bound to proceed according to the rules of the Court from which it arises.

*Same day.***REX v. CORUM.**

In a suit by the crown upon a bond under the post-horse act, the Court cannot give costs against the crown, although the farmer of the duties is the real party.

THIS was a suit in the name of the crown, on a bond given for the duty on post-horses; verdict for the defendant; who thereupon moved for costs, upon affidavit, that the suit was in truth instituted on behalf of the farmer of the tax, and not of the crown itself: but this the *Court* refused; for by the act the suit is in the name of the king himself, whom we cannot make to pay costs; and this is very different from the cases of informations by the Coroner or Attorney General at the relation of an individual.

*Monday,
21st May.*

PRESTON v. STRUTTON and Others Executors of STRUTTON.

Where a balance of accounts is taken, and a note given as the balance, that must be paid; although there are subsequent accounts upon which the payee may eventually be found in arrear.

THE bill stated, that the plaintiff and the testator of the defendants, being partners in trade, the testator, by misrepresentation, had obtained a promissory note from the plaintiff, which the defendants had since put in suit, and recovered judgment upon at law, although the partnership concern being still carried on, there was a balance in plaintiff's favour on the whole account; and therefore he prayed an injunction.

The answer denied the unfair obtaining of the note, and said, that it had been given on a balance of accounts between the partners, and that, from their having that note in their possession, they were induced to believe that the balance was in their favour: but this they would not take upon themselves positively to say.

It was insisted by *Onslow*, for the plaintiff, that as the defendants did not pretend to say for certain, that there was, upon the whole, a balance in their favour, the Court should interfere to prevent the defendants being paid this note till the account should be settled; for it may then appear that in fact they are more indebted to the plaintiff.

Richards for the defendant.

By the *Court*.—When the account is once liquidated, and the note in question given as the balance, that must be paid, unless a second account had been taken, and the balance found the other way; for if it were allowed to run on towards the account, that would defeat the intention of balancing it.

SITTINGS AFTER EASTER TERM.

Thursday,
24th May.

The ATTORNEY GENERAL v. LE MERCHANT
and Others.

An information, stating the vessel of the defendants to have been within four leagues of the coast, having on board geneva and currants liable to forfeiture on being imported into this kingdom, is bad for uncertainty, the geneva and currants not being permitted to be imported, unless with certain restrictions, which therefore ought to have been set forth.

AFTER a verdict for the crown, *Rous* moved in arrest of judgment, on the ground that the information was uncertain and insufficient; it stated, that the officer seized the vessel *within four leagues of the coast, having on board geneva and currants liable to forfeiture on being imported into the ports of this kingdom.*

The Attorney and Solicitor General, *Newnham* and *Leycester*, shewed cause against the rule. This information is on the statute 24 Geo. III. c. 47. s. 1. whereby any vessel found at anchor, or hovering within four leagues of the coast, having on board any goods liable to forfeiture on being imported, shall, as well as the goods, be forfeited; and since the passing that statute, this has been the constant mode of their laying the information.—All that is necessary, is to shew probable cause of seizure, and this throws the *onus probandi* upon the claimant, to shew that he was not within the forfeiture (12 Geo. 1. c. 28. s. 8.); so in the case of prohibited goods,

the general statement in the information is, that the defendant landed such and such goods, then being prohibited to be imported, according to the force of the statute, without stating how the statute attached upon the goods.

Here the saying, that if imported they would be liable to forfeiture by force of the statutes, is sufficiently explicit, for there is only one cause of forfeiture attaching upon each of the species of goods seized upon importation, to wit, on the *geneva*, by 5 Geo. III. c. 43. s. 27. for importation in vessels under 100 tons; and on the *currants*, by 13 & 14 Ch. II. c. 11. s. 23. for being imported from *Germany* or the *Netherlands*; and as the defendants are bound to know the laws, and these are the only causes for which the respective articles can be liable to forfeiture on importation, therefore stating, in the information, that they are so liable by the statute, is a sufficient specification of this as the only cause for which the statute can attach upon each.--And accordingly it was determined in *Penn's Case*, Cro. Car. 314, that where a fishmonger was indicted generally for engrossing fish, this was sufficient after verdict, although, to bring him within the statute, it was necessary that he should have sold again at unreasonable prices, for the verdict of guilty is a finding that he did not sell at a reasonable price; and the same principle prevailed in the case of *Rex v. Thompson*, 2 Term Rep. 18.

But at any rate this is an objection that is cured by verdict, for where the offence is not sufficiently set forth in a declaration, it must be taken advan-

tage of by demurrer, and not in arrest of judgment ; and all the statutes of *Jeofails* are by 4 *Ann. c. 16. s. 24.* extended to suits like the present.

Rous and *Plomer* on the other side.—The general rule in all cases is, that the plaintiff must state his case, so far as is necessary to shew to the Court that, if proved, it will entitle him to judgment. The being liable to forfeiture on importation is not a fact, but a conclusion of law from facts, and the party is entitled to have the case fairly stated, so that when it is proved, he may have the opinion of the Court upon the law, and the benefit of a writ of error afterwards ; but if this principle prevails, it will be sufficient, in all criminal prosecutions, to state that the prisoner or defendant has acted contrary to law, and leave the species of offence to be proved at the trial.

To keep an inn is not indictable unless bad company meet there ; but it never was thought of to indict for keeping an inn, and give in evidence the bad company in order to make it indictable. *Penn's* case does in some degree state the offence, and yet that case has often since been denied to be law.—A verdict cures where the offence is imperfectly set forth ; not where it is wholly omitted, as here.

The act of 24 *Geo. III.* puts all ships in the situation of the present, on the same footing as if the articles had been imported. There is no instance of an information stating merely that the defendant imported goods liable to forfeiture ; but it is always stated why they are so liable.—So this act referring

to those, and to the causes of forfeiture in those other acts, the penalty must be taken advantage of in the same manner ; more especially as in the present case there are other special causes of seizing geneva mentioned in the same clause, to which the information should be rather taken to refer, to wit, for being in too small casks.

The size of the vessel is one of the causes of forfeiture, and as to that the *onus probandi* is upon the crown ; those things only being thrown upon the claimant by 12 Geo. I. which it would be difficult for the crown to prove, and easy for the defendant.—Then as to that the evidence is a surprize upon us, as we had no notice by the information that such evidence would be produced ; and as to the country from which the currants were shipped, the *onus* is thrown upon the defendant, to prove them not *Dutch* or *German*, only when called upon so to do by an allegation on the part of the crown in the information, that they are *Dutch* or *German* ; but we are not bound to prove ourselves innocent when not accused.

The precedents are in general as stated, because most of them are upon goods prohibited, and therefore the naming them in that case is a sufficient specification of the cause of forfeiture ; but as the nature of the goods in that case, so a collateral circumstance in this, are the causes of forfeiture ; and must be equally expressed.—They then read many informations on currants, &c. stating the cause of forfeiture expressly.

By the *Court*.—To be sure, this information is contrary to principle. The goods, if properly imported, would be liable to no forfeiture; then the manner of importation is the only thing which could have made it an offence; but that is not stated.—In all cases where there is a general prohibition, this general statement is sufficient; but where the prohibition is *sub modo* only, there the circumstances must be shewn: unless perhaps it would occasion infinite prolixity; so in all cases for nonpayment of duties, the special ground is stated.—If however there could be shewn a string of precedents the other way, we should be bound by them; but it appears otherwise.

The rule was made absolute; with leave to Mr. *Attorney General* to mention the case again, if he found it supported by precedents.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

TRINITY TERM,

32 GEORGE III.

On the 15th day of *June*, in this Term, the Lord Chancellor, Lord *Thurlow*, resigned the *Great Seal*, which was on the same day given in *Commission* to the Lord Chief Baron *Eyre*, Mr. Justice *Ashhurst*, and Mr. Justice *Wilson*.

The Lord Chief Baron *Eyre* sat in the Court of Exchequer on *Thursday* in every week during this and the following Terms while the Great Seal continued in commission.

LATIMER v. CLARE.

Monday, } By the COURT—The general rule is,
18 *June*, } that where the report of the Deputy
1792. } Remembrancer may be excepted to,
it requires confirmation; but the case of trustees approved of by him as an exception; there the report is good unless excepted to.

Thursday,
22d June.

CAMPBELL v. FRENCH and Others.

Where a discovery is sought of a correspondence, if the defendants set forth extracts of letters, and swear that those are the only parts of the correspondence upon that subject, this is sufficient.

THIS was a suit against the holder of bills of exchange and his agents, for discovery of the correspondence relative thereto, in order to fix him with laches in not giving immediate notice of non-acceptance ; and for an injunction against proceeding at law against the plaintiff.—The defendants put in their answers, setting forth extracts from letters ; some of which referred to other letters not set forth by either ; and others were mentioned by one defendant as received from the other, which the latter took no notice of.—Each defendant swore that he had set out all the parts of letters in his possession relating to that business.

Mr. *Solicitor General, Mansfield, Piggott, and Steele*, shewed cause why the injunction should not be dissolved ; insisting that they had not obtained the discovery sought, unless the letters themselves were produced.—The production of the letters themselves is not sworn to be prejudicial from any discovery of the other matters therein ; but even if it were, as it is their own act to mix this with other business, they must abide by the consequence. The accounts of the correspondence not tallying, at least gives proper room to suspect concealment and fraud ; and even if honest, yet a party should not be allowed to garble and mutilate evidence at pleasure, for what may seem unimportant to him may seem otherwise to the Court.

Partridge, for the defendants.

By the *Court*.—The defendants swear to have produced extracts of every thing relating to those bills; the other parts of the letters are not relating to them; they have sworn at their peril, but very fully; and we cannot order a production of the other correspondence, as we have no inquisitorial authority to investigate all the other transactions of these merchants.—So when a party refers to extracts from books of accounts, those parts which he states to be immaterial are left sealed up.

POPE v. BISH.

27th June.

THIS bill was for an account; setting forth an award, and charging that it was obtained corruptly, and specifying the corrupt transaction.—The defendant pleaded the award, denying corruption and all the particular instances specially by way of averment; and also put in an answer to the same points as the special averments in the plea.

Where the bill charged an award to have been obtained corruptly, the plea setting up the award and denying the specific charges of fraud is bad, as not bringing the cause to one point; and an answer to the same charges over-ruled the plea.

An objection was taken by the *Lord Chief Baron*, that the answer over-ruled the plea.

Burton and *Johnson*, in support of the plea.—It is necessary that the plea should be a complete

bar, and also that it should be supported by an answer denying the special charge of corruption ; but if these averments in the plea are not necessary, they are to be rejected as surplusage.—The award is the material part of the plea ; that is not in the answer ; the averments in the plea and the answer are both only to support that plea ; and, if not necessary, at least cannot over-rule one another ; but we insist they are both necessary. *Vide* the cases cited in *Milford*, 216, note (f) ; 2 *Atk.* 396, 501.

By the *Court*.—The meaning of a plea is to let the party stand upon a single point, which bars the whole demand, without going into an answer as to the rest of the bill ; but this intent would be totally defeated if the plea were allowed to contain averments denying the whole charges of the bill, tending to impeach the award.

The Court gave leave to amend the plea, by striking out the special averments, and let the remainder stand with the answer.

SITTINGS AFTER TRINITY TERM,
SERJEANT'S INN HALL.

SMITH and Others v. BROCKLESBY.

Wednesday,
11th June.

THERE being accounts between the plaintiffs and the defendant, and an action at law brought by the defendant in equity for the balance; the plaintiffs filed a bill for a discovery in this Court, which they obtained, and of course became liable to pay costs.—They had a judgment at law afterwards in their favour, and they therefore became entitled to costs there. The defendant becoming bankrupt it was moved by the *Solicitor General*, that the costs at law might be set off against those in equity; and only the balance be the demand on either side.

Where there are costs in equity and at law due from the opposite parties, the Court will set off the costs at law against those in equity, if the solicitor in equity claims his lien on the latter.

This was opposed by *Partridge*, on behalf of the attorney for the defendant, insisting that he had a lien on the costs in equity for his demand in that suit; and cited the case *Mitchell v. Oldfield*, 4 Term Reports, 123. accordingly.

The *Solicitor General* attempted to distinguish this case from that; for in the case of *Mitchell v. Old-*

field, the suits in which the costs were attempted to be set off, were so distinct that they were even between different parties; but here it is to be considered as all in the same cause, the discovery here being for the purpose of prevailing in the suit at law, and the occasion of success there.

By the *Court*.—This is not like the case where the cause at law is directed by this Court; here they are distinct causes, and although we might have granted this motion as between the plaintiffs and the defendant himself, or his assignees; yet when his attorney, a third person, becomes interested, it is otherwise.

GRANT v. PRIDDELL.

A conditional consent to proceed at law waives an injunction.

THE plaintiff having obtained an injunction against proceeding at law, afterwards entered into an order by consent, before a Judge, that on his perfecting bail, proceedings should stay till within four days of next term, and then proceed. Bail not being perfected, the defendant proceeded at law; and although there was an appearance of having entrapped the plaintiff into it, yet the Court held the injunction dissolved by the consent to proceed at law, although but conditionally.

Burton and Plumer for the plaintiff; *Piggott* for the defendant.

SAWER v. SHUTE.

THE plaintiff having come into this Court to obtain money found by the report of the Deputy Remembrancer to be due to his wife, upon the distribution of an intestate's effects, the Court took into consideration whether they should order the money recovered to be settled on the wife or paid to the husband. Upon reference to the Master, he certified, that by the laws of *Prussia*, of which they were inhabitants, the whole personalty of the husband and wife is, during the coverture, at the absolute disposal of the husband; but on the death of either, is divided between the survivor and the heirs of the deceased. The wife made no application to the Court, either to have it settled or otherwise.

Where a wife was entitled to a share under the statute of distributions, and resident in *Prussia*, by the laws of which, one moiety of the effects of the husband must come to her on his death, the Court did not require him to make any settlement.

After asking what was the rule in regard to money recovered in right of the wife by a husband, subject to the custom of *London*, the Court ordered the money to be paid to the husband.

N. B. It was observed, that it would be very difficult to direct any way by which it could be settled, so as not to be liable to be done away by the laws of *Prussia*.

Friday,
13th July.

DEANE v. RASTRON.

A purchase of land at a halfpenny for every square yard, when the vendee knew that not to be one fourth part of the value, is fraudulent, and void in equity.

THE bill stated that the plaintiff and defendant came to an agreement for the sale of the plaintiff's land to the defendant, at an halfpenny *per* square yard. This price was in all about 500*l.*; the real value 2000*l.* The defendant went out to an attorney, got him to calculate the amount, and desired him not to tell the plaintiff how little it was; then carried the agreement to the plaintiff, and had him to sign it immediately. The bill therefore prayed a discovery of these facts, and an injunction against proceeding at law. The answer denies recollection of any such desire of concealment.

By the *Court*.—It is impossible he can have forgot in so short a time so material a fact, and therefore he must answer.

Abbot suggesting that this was an injunction for not answering, and by the rules of equity could not stay trial, but only execution :

By the *Court*.—The defence at law is to arise out of the answer; and we cannot send him to trial without the discovery sought. The desire of concealment will be such a fraud as to void the transaction, as parties to a contract are supposed, in equity, to treat for what they think a fair price.

Exception allowed, and injunction granted to stay trial.

Burton and *King* for the plaintiff; *Plumer* and *Abbot* for the defendant.

RICHARDSON v. HULBERT and Another.

BILL, by heir at law against trustees, to have a discovery of fraud in obtaining a will, by which lands and chattels were devised to them in trust. One of the defendants answers, that he never acted as trustee, and released all interest to the other; his name was used in the declaration in ejectment, by which the devise was established at law. He did not answer to the fraud. Exceptions being taken,

A trustee in a will, who released and never acted, ought not to be made a party in a suit to set aside the will on the ground of fraud, and therefore need not answer as to the fraud alleged in which he is not personally implicated.

Johnson cited the case of *Cookson v. Ellison*, in 2 Bro. 252. that he must either plead or demur, to avoid answering; but if he submits to answer, he must do so fully. Besides, he cannot by the release give up his title to the freeholds; and therefore is interested. His release is an acceptance of the devise, and an acting under it.

By the *Court*.—He is not charged with personal fraud; has released, and never acted or accepted the trust; and therefore, not being interested, might be examined as a witness.

The exception was over-ruled.

TURNER v. PROBYN.

A. devised to trustees to pay debts, and then to hold till his son should attain 21; then to the son, he paying the father of the testator, 10l. per quarter. The annuity does not commence till the estate of the son comes in case.

A. Devised to trustees, to pay some trifling debts, and to hold till his son should arrive at 21, and then to the son, he paying to the father of *A.* 10*l.* per quarter; but if the son should die under 21, then to the father for life.

Burton and Richards argued that the father was entitled to the 10*l.* per quarter from *A.*'s death, before the son arrived at 21; for the will not saying for whose benefit the trustees should hold, the Court will presume it in favour of those to whose benefit the estate is afterwards to go; *i. e.* to the son and father of the testator, in the proportions they are afterwards to receive; to the son, paying 10*l.* a quarter to the father.

Newnham and Pemberton for the defendant, the son.

By the *Court*.—The trust is to pay debts first; then the surplus, till 21, must go to the son; for the annuity commences upon the son's coming into possession; and this is not a devise of the estate, but of a future burthen upon it. The testator was bound to maintain his son, but not his father; and the trustees stand in his place. Besides, a charge upon the estate after debts paid and accumulations made, is very different from the same charge before.

HARDCASTLE v. SHAFTO.

Friday,
13th July.

A. Made a voluntary settlement on himself and his wife for their respective lives; remainder to their issue in strict settlement. The lands were afterwards decreed to be sold, and the surplus to be laid out in lands to the same uses as in the settlement. On a reference to the Deputy Remembrancer, to inquire who was entitled to the surplus, he found the petitioner entitled in tail, with the ultimate remainder to himself in fee. The petition was, to have the money without its being laid out; this was refused until proper proof should be laid before the Court, that all those entitled to remainders in tail were dead without issue.

Where money was in court, decreed to be laid out in land, the Court refused it to be paid out to the person first entitled to an estate tail in it, with the ultimate remainder in fee, if any intermediate remainders should be found to exist.

ATKINSON Clk. v. FOLKES Bart. and Others.

Same day.

THIS suit was brought by the plaintiff as rector of the parish of *Stillington* in *Norfolk*, against the defendants, occupiers of lands there, for an account of tithes from *Michaelmas* 1785.

A rector having come to an agreement with his parishioners for tithes, cannot in equity set up his own non-residence to avoid the agreement.

The plaintiff, from the time of his becoming rector in *July* 1782, till *Michaelmas* 1784, received from the defendants and other parishioners a composition in lieu of tithes, but no written contract

Such an agreement is not within the 13 or 14 of *Elis.*
Semb.

had been entered into. At that time he entered into a written agreement with all the occupiers of land within the parish, by which it was settled, that the composition should be advanced 30*l.* a year in the whole, from *Michaelmas* 1784 for 21 years; to be paid by the parishioners in the proportions thereby ascertained; and that proper articles of agreement for that purpose should be made out and executed by all parties concerned. No further agreement was ever entered into, although a draught was prepared and sent by some of the defendants to the plaintiff for that purpose at his request. The plaintiff received the augmented composition up to *Michaelmas* 1785: but refused to receive any, subsequent to that time, when tendered by the defendants, on the ground of his having been resident at a distance from his parish for more than 30 days in one year, between *Michaelmas* 1784 and *Michaelmas* 1785, and having given them notice to set out tithes in kind from that time. The defendants insisted that the plaintiff could not set up his own non-residence to avoid his agreement.

Burton, Hollist, and Plumer, for the plaintiff.—The rector is, of common right, entitled to have tithes in kind, and if they are not set out, to come into this Court for an account, unless the defendant can shew that he is bound by valid subsisting agreement to take a composition. The agreement of 1784 is avoided by the subsequent non-residence of the plaintiff, in whatever light it may be viewed. If it is to be considered as a lease, it is declared void by the statute 13 *Eliz.c.* 20; if only an agree-

ment, it is within the 14 *Eliz. c. 11. s. 15*; and as an annual composition, it is determined by the notice.

Those statutes declare all leases in the situation of the present, not merely voidable, but absolutely void; and it has been so held in many cases. *Shepherd v. Twoulsie*, 1 Bulst. 111. *Webb v. Hargrave*, Moore 641. *Jennings v. Haithwaite*, Yelv. 106. *Doe ex dem. Crisp v. Barber*, 2 Term Rep. 749. Therefore whenever the fact of non-residence for 80 days is proved, the Court will annex the legal consequence of that fact, as upon felony, or an act of bankruptcy being found, whatever party may happen to be benefited by it.

The distinction is, that where any avoidance is created in favour of an individual; as where a lease by the predecessor for more than 21 years is declared void, for the benefit of the successor, there the party who made the lease is stopped from impeaching its validity. But where the avoidance is inflicted as a penalty, upon proceedings contrary to public policy, a *particeps criminis* may avail himself of it; as in cases of usurious contracts, gaming transactions, marriage brokerage bonds, &c. And in these cases, equity will assist the complainant whose case happens to be interwoven with the rule of public policy, although he himself is not otherwise entitled to its assistance.

The statute 13 *Eliz.* is made for the purpose of compelling residence of clergymen. For this end it employs two different expedients: first, a pecu-

niary penalty on the clergyman himself; secondly, the penalty of avoidance, operating against the lessee of his benefice as well as himself; and therefore making it his interest to watch that the clergyman shall perform his duty to the public. This statute, however, only reaching actual leases, contrivances were soon found out to evade it, by resorting to less solemn contracts, to supply the place of leases. To remedy this evil, the statute 14 *Eliz.* extends to all "contracts, &c. for suffering or permitting any person to enjoy any benefice, &c. or to take profits or fruits thereof," which the contract of 1784 clearly is.

The intent of the legislature in these statutes, is not to consult the interest of the landholders, but that the people may be instructed in morality and religion. This public end will be equally defeated by whatever mode it may be contrived that others shall enjoy the profits of the benefice, and remit a rent to the clergyman, without his being obliged to reside, for collecting the fruits and performing the duty. A demise to a single lessee, is not so dangerous, in the view of public policy, as a contract like the present, by which all the occupiers of land in the parish are united in interest with the clergyman, to wink at his non-residence and defeat the intention of the legislature.

It seems more particularly to have been intended, that the incumbent should be allowed to take advantage of the avoidance; for the act recites the mischief to be remedied to be, "that the livings appointed for ecclesiastical persons may not, by

“ corrupt and indirect dealings, be transferred to
 “ other uses.” So that the interest of the church
 is particularly meant to be guarded.

If the plaintiff had sued for the composition,
 there is no doubt that he would have been barred
 by the statute 14 *Eliz.* Then if he cannot sue for
 tithes in kind, he has no remedy whatever, and
 must totally lose the profits of his benefice, which
 it will be admitted never was the intention of the
 law. If the plaintiff was legally entitled to tithes
 in kind, the defendants having neglected to set them
 out, he must have an account in this court, what-
 ever may have been the origin of his legal claim.

Partridge, Graham, and Ainge, for the defendants.
 —The statutes 13 and 14 *Eliz.* do not affect the
 agreement between the parties ; for it was only an
 executory contract. If formal articles had actually
 been executed, there might have been a question,
 whether they come within the statutes ; but it clearly
 was not the intention that this writing, of *Michael-*
mas 1784, should remain as the effectual contract
 between them ; and therefore equity will not exe-
 cute it, so as to bring innocent parties within a
 penalty ; but will consider it as still executory and
 binding.

Even if executed, it would not come within
 these statutes. The legislature have there in view
 three descriptions of persons, the parson, the lessee
 of his benefice, and the parishioners. The provi-
 sions were intended for the benefit of the latter ;
 part of the evil to be remedied being, that the

farmers were harassed by lay lessees, strangers to them. The end aimed at is, that the living may not be transferred to other uses.—But here is no transfer, no third person substituted in the place of the minister, but only another mode adopted for his receiving the same value.

The 13 *Eliz.* avoids all *leases* of the benefices. The 14 *Eliz.* was made to include “all agreements, which in law are not taken to be leases, although in fact they amount to as much;” plainly meaning those agreements only which are *in the nature of leases*. But an agreement, that the occupiers shall retain their tithes and pay a composition, is not a lease, nor in the nature of a lease; but rather in the nature of an extinguishment, or of an annual sale of the tithes. All leases, whether legal or equitable, make the lessee rateable to the poor; but on a composition for tithes, the parson remains rateable, and not the occupier who retains the tithes. 16 Vin. 427. ca. 7.

An agreement that the occupiers shall retain their tithes, cannot be meant to be included in the penal part of these statutes; for the 18 *Eliz. c. 11*, a statute in *pari materia*, in case of the breach of the former provisions, authorizes the occupiers to retain their tithes; which would be to affirm this agreement, instead of dissolving it.

But even if this agreement does come within the statute, yet the parson himself cannot take advantage of it, so as to profit by his own wrong.

For though the statute says, that such leases shall be void, yet that is often understood in a limited sense; as where leases by tenants in tail, beyond twenty-one years, are declared to be wholly null and void to all intents and purposes, yet the lessor himself cannot take advantage of that avoidance. All the cases upon the present subject, are of the parishioners, or others not privy to the unlawful act, taking advantage of it.

Agreements with the parishioners, tend to the honour and peace of the church, and the benefit of all parties; but they never can be entered into, if binding on the parishioner, and liable to be dissolved by the parson at pleasure. Such a privilege in him would generally be a high temptation to non-residence, which the statutes mean to guard against. In a Court of Equity it is a general rule, that a party must do equity before he can seek it. The plaintiff rests on his having broken the law, as freeing him from his fair contracts, and expects this Court to assist his unconscientious claim in the first instance, before having even attempted to establish it at law.

The cause stood over to this day, when the opinion of the Court was delivered by

HOTHAM, Baron.—The plaintiff, in this case, sues for tithes in kind, resting on his own non-residence of more than 80 days, as avoiding the composition. The defendants insist upon that agreement as still subsisting and valid; and for them two points have been made.

First, that the plaintiff is not to be allowed to come into a Court of Equity to set aside, by his own illegal act, an agreement fairly entered into.

Secondly, that the agreement in question is not a lease or agreement within the meaning of the 13 and 14 *Eliz.*

As to the first point, it is a general and very old rule, that a plaintiff must come into this Court with clean hands ; and this is more particularly the case with a clergyman coming here, whom we will neither countenance in the breach of a positive statute, nor in the neglect of his religious duties.

In answer to this general rule, it has been insisted, on behalf of the plaintiff, that equity does relieve in many cases, where the party suing is *particeps criminis*, as in marriage brokage bonds, and other transactions against public policy ; although there the relief is only in equity, whereas these statutes avoid the agreement at law also.

Cases have also been cited to shew that the parson himself has been allowed to take advantage of these statutes, to avoid his own lease ; particularly the case of *Webb v. Hargrave*, Moor 641. and the case in *Yelverton* ; but these very little resemble the present.

In the case before us, there seems to be no room for doubt. The plaintiff is attempting to pervert the plain intent of an act of parliament, so as to get rid of a disadvantageous contract by his own illegal

conduct ; and the question is not whether he can ultimately succeed in this attempt. The common law is open to him, or he may sue for his tithes in the Ecclesiastical Court ; but a Court of Equity cannot interfere in aid of his unconscientious proceedings.

This being the preliminary part of the clause, it becomes unnecessary for us to consider the second question, whether the present agreement comes within the true construction of the 13 and 14 *Eliz.* ; although, if it were necessary to enter into that question, there does not appear to enter into that doubt or difficulty in it. But we do not mean to decide upon that point, as the plaintiff fails before bringing his case that length. The bill must be dismissed with costs.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

MICHAELMAS TERM,

33 GEORGE III.

7th November
1794.

ROBINSON v. NASH.

A waiver of irregularity in process by appearance, does not relate back so as to bring the defendant into contempt for not appearing in time.

ROUS moved to discharge an order for an attachment against the defendant for not appearing to process, on the ground that the process served upon him described him by a wrong name.

Plomer contra cited a case in *Michaelmas* Term 1779, in this Court, where it was held that appearance to process cured this defect, agreeably to the practice of the other Courts; but,

By the *Court*.—There is this difference: If a party appears, he waives the irregularity, and takes notice of the writ, as being against himself; but a *subsequent* appearance cannot be construed to have relation back, so as to bring him into contempt,

for disobeying a writ, before his waiver of the informality had made that process valid against him.

The attachment was discharged.

HARDCASTLE v. SHAFTO.

*Tuesday,
13th November.*

THE plaintiff was possessed of lands under a long lease from Lord *Feversham*. The premises consisted of freehold and copyhold tenements, so mixed together that it was difficult or impossible to distinguish the one from the other. It became material that they should be distinguished; the lands being improved by buildings since the demise. Lord *Feversham* had, in fact, no right to demise the freehold for so long a term, being only tenant in tail thereof. The heir under the intail brought an ejectment, which was tried before Lord *Mansfield* at the sittings after Hilary Term 1778, and he was nonsuited, because Lord *Feversham* had at least a right to demise for 21 years, which was not then expired: bringing another ejectment after the expiration of the 21 years, he recovered; and the plaintiff brought the present bill for an injunction; and to compel, among other things, a discovery of the boundaries of the freehold and copyhold lands.

On a bill for discovery, the answer of the party interested cannot be dispensed with, though an infant, and although the person from whom his father purchased the right, has answered and denied any knowledge of the circumstances.

On a motion this day, by *Plomer*, to dissolve the injunction, on the coming in of the answer, *Burton* and *Richards* shewed for cause, that it appeared by the answers, that one *Cox*, since deceased, had bought part of the premises from the heir in tail; and that his heir was an infant, and not being a party, the plaintiff had no opportunity of a discovery from him of the metes and bounds; and cited a case of *Wright v. Pinkney*, where Lord *Thurlow* ruled, that upon dissolving an injunction obtained till a discovery, the answer of the person beneficially entitled was requisite *in point of form* (as well as that of the administrator); and although *Plomer* contended that in that case the substantial defendant was capable, from circumstances, of gaining fresh disclosure; but here *Cox* bought on a speculation from another of the defendants, who denies knowledge of the bounds; and his infant son cannot give any information, if his father could; yet,

By the *Court*.—Though it is probable *Cox's* son will not be able to make any disclosure, yet it is not impossible that the father might have some documents; and we cannot dissolve the injunction without the answer of so material a party.

The injunction was continued, with liberty to amend and make *Cox* a party.

DE TILLON v. SIDNEY.

Same day.

ON a motion, by *Stanley*, to discharge the attachment against the defendant; the Court, upon consulting the officers, held the practice here to be, that where there is only one defendant, the *sub-pœna* itself must be served, and a copy will not do.

Johnson for the plaintiff.

The attachment was discharged.

REX v. BOLTON.

*Friday,
16th November.*

A RECOGNIZANCE having been estreated into this Court; *Knapp* moved, that it might be discharged, on a *certificate* of the Deputy Clerk of the Peace, that it had arisen from an error of his.

By the *Court*.—It is a rule that no officer can *certify* his own mistake; he must make an *affidavit* of the facts.

Same day.

— v. —

PLUMER moved to discharge the defendant out of custody, on an affidavit that the cause of action for which he was arrested, arose in *Ireland*; that he had since been found a bankrupt in *Ireland*, and obtained his certificate there. He relied on the case of *Balentine v. Golding*, Mich. T. 24 Geo. III. in B. R. (Cooke's Bankrupt Laws, 522.) in which Lord *Mansfield* granted a similar application.

EYRE, Chief Baron. — You have not shewn to this Court what effect the certificate has in *Ireland*; we cannot give any force to it here till that is ascertained. Probably this information was given to the Court of King's Bench in the case cited; but we cannot take their decision as proof of the fact, and follow them blindfold in it.

Same day.

KING v. WIGHTMAN.

On a bill for specific performance of an agreement for the sale of a lease, the Court cannot apportion the price according to the time already expired.

THIS was a bill for a specific performance of an agreement for the purchase of a lease; the original agreement was in 1790, at which time seven years of the lease were to run; and the counsel for the plaintiff, in settling the terms of a decree by consent, agreed to accept the same sum which was

to be paid in 1790; although two years were since elapsed out of seven.

There cannot be
a rehearing
after a decree
by consent.
Semb.

Partridge, for the plaintiff, now moved for a rehearing, on the ground of this evident mistake. But,

EYRE, Chief Baron.—When you brought a bill here for specific performance, you ought to have considered whether it was for your benefit to obtain it or not. The most beneficial decree that the Court could have pronounced for the plaintiff, would have been exactly that which has been made by consent. We can only on this bill decree specific performance of the *same* contract; not of a similar one. We could not have made a new contract for a different sum, by apportioning the price according to the time which has yet to run; and therefore, we do not think there is any mistake.

Besides, the decree being by consent, it is not clear to us that a rehearing could be granted on the ground of the most obvious mistake. There is no instance of the Court having ever done so.

Motion refused.

Partridge for the order; *Burton* against it.

Wednesday,
21st November.

OLIVER Clk. *v.* HAYWOOD and Others.

Bill for tithes praying discovery whether the defendants had not associated together in their defence; demurrer to the discovery was allowed.

THIS was a bill by the rector for tithes, against the defendants, his parishioners, stating that the right to take them in kind from the different defendants, accrued at different periods; and praying a discovery, whether the defendants have not combined together to support one another against the plaintiff as parson. The defendants demurred to the discovery sought, as subjecting them to a penalty.

Burton and *Hollist* for the demurrer, contended that this prayer of discovery was void, as calling on the defendants to tell whether they were guilty of maintenance or not; for the title of each to resist the payment of tithes is different; one is exempted by a modus, another by a composition; and so no unity of interest can exist; and if he who is exempted by a composition, discovers his having agreed to support the expences of one who sets up a modus, he is confessing himself guilty of maintenance: and here the right of the parson commences against them at different times; so that the associating for defence of all the suits, would make some defend the suits of the others, for tithes due before the claim upon themselves begins, in which there can be no pretence of unity of interest.

Partridge, *Romilly*, and *Rider* contra, held that this was no maintenance; for the demand against all being of the same nature, the time when it

commenced is immaterial, only going to the quantity of the demand against each; and therefore their joining is to resist a common demand upon them. The joining them in one bill shews that their interests are considered in law as one; and if there was any objection to it, the demurrer should have been to the whole bill, for joining separate demands. But the interest of the parishioners is always considered as joint against the parson, as that of the tenants of a manor against the landlord; and therefore it is, that the Courts will allow a bill or defence of a few in the name of the whole, to bind the common right: at least it *may* not be a criminal association; and surely, it is no cause of *demurrer*, that they *may* be subject to a penalty, but only where it appears that they *must* be so.

HOTHAM, Baron.—Either the combination is criminal, or it is not: if it is, then the discovery cannot be granted, as subjecting the defendants to a penalty; if it is not criminal, then the discovery is useless and impertinent; and therefore the demurrer must, on either ground, be allowed.

LEE v. SHOULBRED.

Thursday,
22d November.

THE defendant had brought an action at law against the plaintiff in equity: after plea, the plaintiff filed this bill for an injunction against

On a bill to obtain evidence for a defence at law, when the evidence is obtained the Court cannot proceed

to give relief; although the party cannot have the effect of the evidence at law from objections of form.

further proceedings at law, and for a discovery and commission to examine witnesses and papers in *America*. Upon taking this commission, the plaintiff found that he had mistaken the grounds of his defence at law, and accordingly moved the Court of King's Bench for leave to amend his plea, which was refused; and the defendant recovered.

The plaintiff bringing the cause to a hearing, insisted that as the defence which the plaintiff had now discovered would have been clearly good at law if pleaded at first, the plaintiff was entitled to the benefit of it in some shape; and as the forms of the Court of King's Bench prevented him from having justice there, a Court of Equity ought to lend its aid, by continuing the injunction until the defendant shall allow the cause to be tried on the real merits.

EYRE, Chief Baron.—You have no original equity here; your bill is for an injunction till you can procure the evidence necessary for your defence at law; you have got that evidence; you have had the benefit of it, and tried its efficacy in the motion to amend your plea. The purpose of the bill is answered.

The bill was dismissed.

Mansfield and *Stanley* for the plaintiff; the *Solicitor General* and *Steele* for the defendant.

LYFORD v. TYRREL.

Friday,
23d November.

A RULE had been obtained on a former day by *Plumer*, to shew cause why the defendant should not be discharged out of custody on filing common bail, on affidavits stating that the defendant came to the plaintiff's house on a *Sunday*, when the plaintiff secured his person in the house, and detained him there till next morning, and then brought a sheriff's officer to arrest him on a *quo minus* for 500*l.* for which he is still in custody.

Laws this day shewed cause, upon affidavits of the defendant's having on the *Monday*, at the time of his arrest, agreed to waive every benefit of the forcible detention, upon conditions which he contended that the plaintiff had performed.

By the *Court*.—We cannot distinguish this from an arrest upon *Sunday*, which is purely void ; and no subsequent consent of the defendant can make it good.

The rule was made absolute.

Wednesday,
28th November.

— v. —

ON inquiry of the officers, the practice of this Court was ruled to be, That on exceptions to an answer, if the defendant means to submit to the exceptions, he must give notice thereof to the other party, before he can file his amended answer. It was admitted to be otherwise in the Court of Chancery.

DOR on dem. DUPLEIX and Others v. ROZ.

A trust, consisting of 25 persons, who are to proceed to elect new trustees, so as to fill up their number, when they shall be reduced to 15, may elect before that time.

A majority of trustees may bring actions in the name of the whole.

Neither a tenant in common nor any other can be admitted a defendant in ejectment without confessing lease, entry, and ouster.

THIS was an ejectment brought in the names of the trustees of the chapel and the followers of the late Mr. *John Wesley*. The trust deed, under which the trustees derived their title, was a conveyance to Mr. *Wesley* and 24 others, for the purposes therein mentioned, with a clause, "that when, by death " or otherwise, the number of the said trustees " should be reduced to 15, then the said remaining 15 trustees, or the majority of them, or the " survivors or survivor of them, shall proceed to " elect, &c." so as to make up the complement of 25, and to convey to the whole body so completed. There was no clause in the deed empowering the majority to bind the whole, in bringing actions in their joint names. It appeared, on affidavits, that

by the deaths of Mr. *Wesley* and seven others of the trustees, the number had been reduced to 17. It was then proposed to fill up the vacancies, and accordingly, at a meeting of the trustees, eight new trustees were elected by the majority. Five of the trustees, of whom *Dewey* the treasurer was one, refused to concur; but the other 12 conveyed the interest of the old trustees to the whole body, composed of the old and the new. The other five resisted these proceedings; and the door-keeper, who had the key of the chapel, and the other servants of the trust, (the lecturer, librarian, &c.) who had apartments in the premises, taking part with these five, kept possession of the premises under their authority, and continued to account with *Dewey* for the emoluments, although the other trustees had in the mean time appointed another receiver. There being great animosities on both sides, at a meeting of the trustees, (which consisted of the eight new members, and the twelve who appointed them, the other five not attending,) it was resolved by a majority, that ejectment should be brought against the persons so holding possession. This action was accordingly brought upon several demises, among which was one from the 17 remaining old trustees, and another from the whole augmented number. The dissenting five, never having agreed that their names should be made use of, had on a former day, upon affidavits of these facts, obtained a rule to shew cause,

First, Why the names of the said five trustees should not be struck out of the declaration.

Second, Why they should not be admitted defendants without being obliged to confess ouster; only confessing lease and entry.

Cause was this day shewn by *Piggot, Law, and Gibbs*, on the ground that the election was according to the intent of the trust deed, and therefore this action was the act of the body; but at any rate, there having been a majority of the old trustees present at the meeting where the action was agreed upon, it was the act of the majority of the trustees, whether the new trustees be considered as having votes or not; and therefore, this being the act of the whole trustees, on behalf of the trust, to perfect which, the names of all trustees are necessary, it would be such a breach of trust in them to withhold the benefit of their names, as the Court will not permit. In a case this term in the King's Bench, *Doe on dem. Crafter and another v. —* it was moved, on behalf of *Crafter*, that his name might be struck out; but on its appearing that he was only a nominal party, having assigned all his interest to the other lessor, the Court refused to strike out his name, saying, they would not permit such an evasion of justice. So, if the obligee of a bond assigns, he is bound to lend his name to the assignee in an action upon it; and if he releases to the obligor, the courts of law avoid the release as against conscience. And as the other trustees indemnify them as to costs, that can be no objection. The second motion depends upon the first; for it is clear, if they are forced to lend their names to the plaintiffs, they cannot also lend them to the defendants.

Plumer, Marriott, and Laws, contra.—These five trustees being tenants in common with the others, are at liberty to defend for at least their five undivided parts; and therefore to have the second part of the rule; for as they would be subject to the costs of this action, if it were proved that they have actually ousted the other trustees, it cannot be desired that they should confess ouster, which would conclude them as to that fact; *Oates on dem. Wigfall v. Brydon*, 3 Burr. 1897; and all the books of practice accordingly hold, that a tenant in common may defend without confessing ouster. Then, if they can be defendants, it follows, that the first part of the rule must also be granted, as they cannot be both plaintiffs and defendants.

The majority of a body of tenants in common cannot bind the rest by bringing an action in their name; when the majority of a body of tenants in common *in trust*, wish to do so, and the rest refuse to join, it is their duty to resort to a Court of Equity for directions as to the management of the trust; and accordingly these bills are common, while there is no instance produced of their names being used in suits without such direction of a Court of Equity. The cases cited are of trustees who have no interest remaining in them, nor disputed claim, as here; there is no instance of a *co-trustee* being forced *by the others* to join. The offer of indemnity from costs is a proof that they have no right to use the names of these plaintiffs; for if they had a right, they might do it without any indemnity.

It does not appear by the affidavit, that there was a *majority of the old trustees* consenting to the bringing this action; for it states, that the meeting consisted of the aggregate body of the 12 old trustees and the new, and *a majority* resolved upon this measure, which may have happened although a majority of the old members opposed it. And no subsequent assent will ratify the act, as if it had been originally the act of the major part of the old trustees; and even if there appeared to have been a majority of them consenting, yet the presence and example of the new members may have led them to this measure; and it is impossible to say how they would have acted if the others had not been among them acting as members of their body. Then this action cannot be said to have been instituted by the trustees acting as a body, unless these new trustees had a right to vote among them, and were duly elected.

This depends upon the words of the trust deed; for as they could not have filled up their numbers at all without a provision for that purpose in the deed of trust, this, like other powers, must be exercised according to the restrictions with which it is given. By the deed it is provided, that when they are reduced to 15, they, or the survivors or survivor of them, shall elect. If the period of their being reduced to the number of 15 means any thing, it is to prevent any election till then; for after they are once so reduced, they are to fill up the original number, even if they should neglect to do so till only one remain. And there is a good reason why they should be prevented from electing

till that period, viz. to save the expence of a separate election and conveyance on every vacancy.

EYRE, Chief Baron.—Upon the whole scope of this instrument it rather appears, that the trustees have not exceeded their powers in electing these new members into their body; for the general intention of the trust deed clearly is, that there shall be a succession of trustees on the death of those originally created; and the period of their being reduced to fifteen, is that at which they are *compellable* to fill up their numbers, not but what they may do it sooner.

But at any rate, this action is brought by the trustees *de facto*, and even by a majority of the old; so that if the minority dispute their proceedings, it is for them to bring a bill in equity to have the real intention of the trust deed executed. The trust cannot in the mean time be dormant and neglected, until a suit in equity shall be brought by some of the parties and determined. If the tenants in possession can avail themselves of the authority given them by the five trustees, they will not be precluded by this decision; and they will then have an opportunity to question the right of the new trustees, if their claim is set up at the trial.

The claim of the five trustees to hold their shares of the trust, is admitted by the action being in their names jointly; therefore they need not be admitted defendants to secure that claim.

As to the second motion, it is over-ruled in discharging the first; for if they continue plaintiffs, they cannot be defendants also.

At any rate, however, the latter part of the rule could not have been granted; the ouster, which is the gist of the action of ejectment, is the ouster of the nominal plaintiff, which cannot by possibility be proved at the trial; and therefore if we allow any one to defend without confessing ouster, the plaintiff must be nonsuited. I am astonished any Judge should ever have entertained an idea, that ejectment could be maintained without ouster confessed; and if the case in *Burrow* amounts to that, I cannot admit its authority. The same effect may be attained between tenants in common, where there is no actual ouster admitted, by confessing it under a special order of the Court that it shall be without prejudice.

The other Barons being of the same opinion, it was ordered that both rules be discharged, on the five trustees on whose behalf they were obtained, being indemnified by the rest as to costs.

SITTINGS AFTER MICHAELMAS TERM,
SERJEANTS INN HALL.

EDMONDS v. TOWNSEND.

Wednesday,
13th December.

IN this cause a feme covert attended to give her assent to her portion of the residuum of an intestate's estate being paid into the hands of her husband; but as there were some out-standing debts, (though almost desperate,) and the exact sum which would come to her not being in other respects ascertained by the Master's report, on account of some demands on the estate, which, if allowed, would in some degree diminish her share; the *Court* said, they could not take her consent till the quantum was fixed.

The Court cannot take the consent of the wife to the disposal of her fortune, unless the amount is ascertained.

Burton then proposed that her consent might be taken for the whole which her share should amount to, without any deductions; and argued, that such consent would cover any less sum to which by abatements it might be reduced.

By the *Court*.—That would be in effect taking her consent now, to a sum to be ascertained at a

future time; and thereby depriving her of the power of changing her mind in the interim, which we ought not to do.

THORNTON v. PROCTOR.

Same day.

At the commencement of a partnership, the partners both living in the same house, entertained their customers jointly: one removing, the whole expence of entertainments, (which were necessary in the trade,) fell upon the other. They ought to have agreed for an allowance; the Court can make none.

—
The accounts having been annually balanced without such allowance, is conclusive.

THE plaintiff and the defendant became partners in the wine trade in 1781; articles were then entered into, by which all profits and all expenditures were to be equally shared. At that time they both lived in the house where the business was carried on; but at the end of nine months, the defendant went and resided in another. The plaintiff, from that time till the dissolution in 1790, managed the whole business, and was at considerable expence in treating the customers, which was found to be necessary in that trade. The plaintiff had kept a cash account of all profits and expences, and struck a balance every year. In such accounts there was no charge for entertaining customers. There was no proof of the plaintiff having ever, during the partnership, demanded any allowance on that ground. The plaintiff proved that 50*l. per annum* would be a reasonable allowance to him for such expences in entertainments, and that such an allowance was usual in the trade; and it was admitted that an article of that nature is commonly inserted in the agreement of co-partnership.

On reference to the Master, to take an account, &c. making all just allowances between the parties,

and if any account settled, to proceed on the fact of that account, &c. the Master allowed the plaintiff the 50*l.* a year for entertainments of customers. Exceptions to this report being taken by *Burton* and *Simeon*,

Richards and *Alexander*, for the report, argued, that the original intention having been that they should both reside on the premises, and jointly support the expence of entertaining their customers, the want of a provision in the articles of agreement for such a circumstance as the one removing to a distance, cannot prejudice. Upon that new circumstance arising, it became reasonable for the plaintiff to have such allowance, he being now subject to the whole expence, contrary to the original intention; and the defendant continuing to reap the profit of it without taking a share of the burthen. Yet the defendant not having agreed that such an allowance should be made him, he had no right to insert such an article in the cash account, or credit himself with it in striking the annual balance; which balance therefore relates to other matters only, and cannot conclude as to this.

But the *Court* held, that there being no universal custom in the trade to make such an allowance to the acting partner, and it being, on the contrary, the common practice to insert such a clause in the agreement where it is intended to be made, this should have been inserted in the original articles of co-partnership, or made the subject of a

fresh agreement, if it arose subsequent; and there being no such agreement, the Court cannot make one.

If the plaintiff is entitled to any such allowance at all, he must claim it as being a gross article of expenditure for the co-partnership, and therefore it should have been included in the account; and the plaintiff having struck a balance yearly without any such article in it, shall be concluded thereby.

The exception was allowed.

Same day.

RUSSEL v. SMITHIES.

A mortgagee is not bound to keep up buildings in as good repair as he found them, if the length of time will account for their being worse.

ON a bill of foreclosure, it was referred to the Deputy Remembrancer to take an account what the mortgagee had received from the rents, &c. or might have received, without wilful neglect in her. It appeared that the premises (malt-houses, &c.) had been allowed to fall so much out of repair, that the rent fell from 22*l.* to 18*l.* Plaintiff had done some repairs, and had held 40 years.

Graham and *Stanley* argued, that the mortgagee in possession being only a trustee till foreclosure, is bound to keep the premises in the same repair as if he was owner, 2 *Vern.* 392. 3 *Atk.* 518; and that

the diminution in value should have been charged on the plaintiff, as she might have received the difference if she had repaired.

By the *Court*. — The mortgagee has done some repairs; and, as the only proof of these repairs being insufficient is the diminution in value, we must confirm the report; for it cannot be supposed that after 40 years possession, the mortgagee is bound to leave the premises in as good condition as he found them.

EDMUNDSON v. HARTLEY.

Thursday,
15th December.

BILL to set aside an award, and open transactions, stating many circumstances of improper conduct in the arbitrators; that they had named a day for hearing the parties; the defendant did not attend; the plaintiff attended with witnesses, one only of whom was heard, the arbitrators saying they did not require any more, and that if they should hear the defendant's case before making an award, they would give the plaintiff notice to attend; but that they afterwards appointed another day, and gave the plaintiff so short notice, that he could not attend by reason of the distance; whereupon they collusively awarded against him. The defendant pleaded the award, and denied collusion, averred that the defendant had sufficient notice to

An award, impeached in the bill, must be pleaded *in* *re* *quod* *libet*.

attend at the making the award, and that it was fair and equitable. To this plea there was joined an answer denying specifically all the charges of mal-practice in the arbitrators, and stating the same things contained in the averments of the plea.

Johnson, for the plaintiff, argued, that the award was void, because it awards releases up to the time of the award, and that all suits and demands shall cease up to that time; whereas the submission is of all demands up to the time of the submission only. And although it has been determined that a release awarded up to the time of the award, where the arbitrators have no authority to award it to that time, shall be satisfied by giving a release up to the time of the submission: yet here they have also awarded that all demands shall cease up to the same time, which takes away all doubt of their intent to exceed their authority; and as this award, if not set aside, is a bar to any cause of action arising between the date of the submission and the making of the award, it is therefore void. The plea is informal in this respect, that it is a plea "to the relief sought upon all matters referred to the arbitrators;" whereas it ought to state what part of the bill in particular it is meant to bar.

It is also over-ruled by the answer; for this very point was lately determined in the case of *Pope v. Bish*, which was exactly the same as the present; and there the Court held, that it must be a naked plea of award, and that any averments in it are over-ruled if repeated in the answer; and are not to be considered as surplusage.

Burton and Romilly, in support of the plea, cited 3 *Atkins*, 529. 3 *P. Williams*, 315. from which *Mitford* (page 209) draws the general conclusion that this is the proper mode of pleading.

So in the case of *Butcher v. Cole*, at the Rolls, before Lord *Kenyon*, 26th June 1786, where to a bill to set aside an award on the ground of collusion and want of notice to the plaintiff to attend at the making of the award, the plea stated the arbitration, and that the plaintiff had full notice, that an agent from him attended, and there was a full discussion before the award was made. There was also an answer containing similar averments of the fairness of the transactions. His Honour held the plea good; for an award pleaded nakedly would be *exceptio ejusdem rei cujus petitur dissolutio*, and is no full bar to the demand without denial of collusion and partiality.

These averments therefore are necessary, and if any of them should not be thought necessary, it is at most only surplusage, which will not vitiate.

The *Court* considered themselves bound by their own decision in the case of *Pope v. Bish*, to hold that the award must be pleaded nakedly; but declared they did not mean to extend it beyond the case of awards; and thought that it would be too much to over-rule the plea on this objection; and therefore, as in the case of *Pope v. Bish*, gave leave to amend, if the plaintiff should insist upon it; otherwise to be good by consent.

Friday,
14th December.

WOOLS v. WALLEY.

In a bill for the single value of tithes, it is not necessary expressly to waive the treble value. **O**N exceptions taken to the answer, it appeared that this bill was for tithes, and prayed an account of the single value of the tithes, and that the defendant might be decreed to pay such single value, but did not expressly waive the penalty; and on this ground,

Alexander argued, that the defendant was not bound to discover upon this bill, as he was thereby subjecting himself to the penalty at law, the plaintiff not having waived the treble value, although he only seeks the single value from this Court, which is the same as an account of tithes simply. The constant practice is to waive it expressly; and the case in *Bunbury*, 193. must therefore be a mistake, for it supposes this practice antiquated.

Hart, contra, contended that the prayer of the single value was in fact an offer to accept that, and therefore a waiver of the penalty, and relied on *Bunb.* 193.

The Court were of that opinion; for a waiver in equity is no bar at law, but only a ground for the interposition of the Courts of Equity; and an injunction would be granted against suing for the penalty, as well upon this implied waiver, as upon the most express.

BOWSER v. HUGHES and Others.

Sine day.

THE bill stated that the plaintiff agreed with the defendant *Hughes* for the lease of iron works, and had expended large sums on the works, but falling into difficulties, was compelled to accept from the defendant a less beneficial lease than that agreed upon; that the defendant afterwards broke the covenants to be performed by him, both by nonpayment of money and in other particulars, by which the plaintiff was much injured; that the plaintiff afterwards being put in prison for debt, and being insolvent, was advised to take the benefit of the act 14 Geo. III. for relief of insolvent debtors, and was brought up for that purpose at the quarter sessions, and discharged in pursuance of the said act; that the other defendants were chosen his assignees, and the plaintiff having delivered in a schedule, according to the directions of the act, his estate was vested in them; that his assignees, although he is entitled by the act to the surplus of his estate after discharging his debts, and although they have received sums fully sufficient for that purpose, have always refused to give him in any account, and have by collusion with the defendant *Hughes* neglected to sue him on the covenants; and therefore the bill prayed an account of the effects come to the hands of the assignees, and that the surplus should be paid to the plaintiff, and also that an account be taken of the plaintiff's demands against the defendant *Hughes*, and that the defendant *Hughes* be decreed to execute to the plaintiff a new lease according to the

Bill by an insolvent debtor against his assignees, under the 14 Geo. III. and a debtor to his estate, stating collusion between them in not recovering the debt, praying that the assignees might be removed, and that specific performance of an agreement for a lease might be decreed against the debtor; plea, by the debtor, the assignment under the act, and that the right to sue was vested in the assignees; that the estate is insufficient, and denying collusion, held good.

original agreement, and that the defendants his assignees be removed, and others appointed in their place.

To this bill the defendant *Hughes* pleaded the insolvent debtors' act 14 *Geo. III.* by which (as in the plea stated) it is enacted, that insolvent prisoners, complying with certain regulations in the plea mentioned, and delivering in a schedule {of their real and personal estate and the debts to them, should be set at liberty; and that his real and personal estate, debts and effects, should be vested in the Clerk of the Peace, and by him be assigned to assignees named by the Justices at the sessions; that such assignees should have power to sue for the recovery and attaining any estate or effects of such prisoners: and it was further enacted, that the Judges of the Courts at *Westminster* or the Great Sessions of *Wales*, upon petition of such prisoners, or of any of their creditors, complaining of mismanagement, might make and give such orders and directions therein, either for the removal of the assignees and appointing new, or for the prudent and equitable management of the estate for the benefit of the creditors, as they should think fit.

The plea then stated, that the plaintiff being confined in gaol in *Glamorganshire*, petitioned to be discharged under the act, and delivered in a schedule of his estate, (but it was not stated in the plea that *all* the regulations in the act necessary for obtaining his discharge were complied with,) and was accordingly discharged by the quarter sessions, and his estate assigned by the Clerk of the Peace to as-

signees ; that the transactions which gave rise to the bill, passed before his taking benefit of the act ; that his estate was insufficient for the payment of all his debts ; that there has been no complaint made against the assignees, either by the plaintiff or creditors, in order to have them removed ; it also denied collusion with the assignees. The plea came on to be argued this day by

Burton, Plumer, and Short, in support of the plea. Whether the defendant be liable to be sued by the assignees or not, there is no privity now subsisting between him and the plaintiff so as to subject him to this suit ; his whole estate is vested in his assignees. A bankrupt cannot institute a suit for a debt due to himself before his bankruptcy, but the right of action is exclusively in his assignees. In the present case, the assignees are enabled by the act to sue : and in the case of *Collet v. Saunders*, at the Rolls 7th February 1791, where the bill was by the purchaser of a fund from a person who afterwards took the benefit of an insolvent act ; and it was objected that the insolvent debtor should have been a party ; his Honour, after taking some time to consider, held the bill right. This proves that the insolvent debtor is considered as having no interest remaining in him ; and the evident intention of the legislature is to divest him of all his property or rights, as a person no longer to be trusted with the management of them.

He has not even stated any case of fraud against his assignees, so as to be entitled to sue upon that ground ; but merely alleged collusion generally :

and although the Courts have allowed legatees to sue debtors to the testator, yet that has only been on strong causes of collusion between the debtors and the executors, and on the ground that there is no other remedy: but here there is another remedy pointed out, by petition to the Judges of the Courts at *Westminster*, or Great Sessions in *Wales*; who have power to make all necessary orders, by removing the assignees or otherwise.

Newnham, *Selwyn*, and *Abbot*, for the plaintiff, argued, that the plea was bad both in form and in substance. In form;—the plea makes no objection to the bill, that did not appear upon the bill itself; for it was stated in the bill, that the plaintiff was discharged in pursuance of the insolvent act, and his estate vested in assignees, and the plea amounts to no more; this then was the proper subject of a demurrer, if any thing.

But when the plea sets out the act, by which certain regulations are imposed, previous to the obtaining the benefit of it, and that some of these regulations have been complied with, it is bad for not shewing that *all* have been complied with: and a plea here must be *omni exceptione major*, and equally strict as at law; *Burk v. Brown*, 2 Atk. 398. It does not appear by this plea that the plaintiff was entitled to the benefit, nor consequently subject to the disabilities of the act.

But while it omits necessary averments, it introduces many unnecessary, and is therefore double, and bad; for although the act, and the plaintiff's

having complied with it, and the assignment of his estate, may stand together as leading to a single point; yet the averment of insufficiency of the estate cannot be at all connected with these. To this plea therefore the replication must be multifarious, which is the test of the plea being so; whereas the very meaning of a plea is to reduce the cause to a single point.

It is also bad in substance.—The plaintiff is entitled by the act to the surplus if any, and by the bill it is stated, that there will be a surplus; he has therefore an interest in seeing that the fund, out of which the surplus is to arise, is properly administered; and is still more interested if there be no surplus, for then his future effects, though not his person, are liable to make good the deficiency.

The remedy given by the act, by petition to any of the Judges, does not exclude the jurisdiction of the superior Courts. In the case of a bankrupt, the petition to the Great Seal is a shorter and speedier mode of prosecution, and generally followed; but a bill may be filed for the same purpose; and here the summary remedy will not answer the purposes of the bill; for that jurisdiction has no power to compel the defendant *Hughes* to make a lease according to the agreement, which is part of the prayer of the bill.

As the plaintiff must have a right to institute this suit against his assignees, as being the only full remedy he can have, he must make *Hughes* a party; for it is from their collusion with him, that the

right to sue accrues. The case of *Collet v. Saunders* only proves that a bankrupt need not be joined as a defendant in a suit concerning his estate; not that he cannot be a plaintiff. A legatee need not be joined in a suit against the executor, yet he may be a plaintiff, on the ground of collusion between the executor and debtor. In *Elmsley v. M^cAuley*, 3 Bro. R. 624. such a bill was dismissed because the executrix had not been required to sue the debtor; but in this case the assignees have refused to sue *Hughes*, which is the greatest presumption of collusion; and this is not answered.

Burton, in reply.—It is necessary to set forth, that the plaintiff complied with the essential requisites of the act, and that the defendant has not colluded with the assignees; therefore a demurrer would not have held: the compliance with *all* the regulations is not necessary to be stated, for having, as stated in the bill, obtained the benefit of the act, he is concluded from saying he was not entitled to it; although possibly the creditors might have objected to the plea for want of these forms. The averment of insufficiency of the estate, if improper, is to be rejected as surplusage—*ut res magis valeat quam pereat*.

On a subsequent day, (in the Hilary term following,) *НОТНАМ*, Baron, informed the counsel that the Court had considered this case, and were of opinion that the plea was good.

PISTOR v. DUNBAR.

Saturday,
15th December.

THIS cause came on upon exceptions to the Master's report. It was a bill by the residuary legatee against the executor. The will directed that one *Edward Pistor* should carry on his business to a given day, for the benefit of his estate. The executors, from the confidence thus reposed in *E. P.* by the testator, permitted him to get in debts due to the testator to the amount of 240*l.*: he not paying this money over to the executors, was taken in execution at their suit; in taking the account, the Master refused to charge the executors with this sum.

A testator directs that the business shall be carried on by *E. P.* The executors permit *E. P.* to get in the outstanding debts. There being no such direction in the will, the executors are liable.

Partridge and *Johnson*, for the plaintiff, contended that this was to be charged upon the executors, for *E. P.* not being directed by the will to call in the debts, has acted in that only as agent for the executors: and if one enables his co-executor to get in a debt, or collect assets of the testator, they are both liable, 2 Bro. Ch. R. 114. *Saddler v. Hobbs*; much more so in the case of a stranger. Here the defendants having taken *E. P.* in execution for the debt at their own suit, (in which they must have sued in their own names, and not as executors,) have thereby received satisfaction for the debt. Thus, in *Chilton v. Whiffen*, 3 Wils. 13. one who had accepted bills for another, and had not paid the debt, but had been taken in execution for it, was allowed to recover the amount against the prin-

cipal, on the ground that his body being taken in execution was a payment of the debt.

Burton and Scafe, on the other side, argued, that the direction of the testator, that *E. P.* should carry on the trade, implied that he should collect the debts in it, and that the executors could never be personally answerable for putting the same confidence in him, which the testator himself had done ; but are only liable for such negligence as a man would not have been guilty of in managing his own concerns ; and if the executors here are liable, as having *E. P.* in execution, then every executor who uses this sort of diligence to compel payment of debts due to the estate of the testator, is answerable for the amount as if actually received.

The *Court* said, that if there had appeared the slightest presumption in the will that the testator intended that *E. P.* should collect the debts due before his death, they would have held the executors discharged, as they appeared to have acted *bonâ fide* ; but as there was no such intention hinted at in the will, the executors must answer for this money as received by their agent.

The exception was allowed.

HARDWICK v. MYND.

Same day.

WILLIAM MYND, the testator, by his will left considerable estates to his son and heir *William Mynd*, charged with certain legacies to his daughters; he left other estates to *George Mynd* and *John Roberts*, in trust, for payment of his debts, and appointed them his executors. *George Mynd* and *John Roberts* renounced the executorship, and conveyed their interest in the freehold estates to the son, subject to the trust; the son, *William Mynd*, got possession of the personal property also, but without taking out administration. He paid some trifling legacies left by his father's will; mortgaged the greatest part of the trust estate for his own debts: and, in about 11 years after his father's death, became bankrupt.

The creditors of the testator filed this bill for satisfaction of their demands; and various questions arose in the discussion of the cause.

It was argued by *Burton* and *King* for the plaintiffs;—*Selwyn* and *Hollist* for the defendants *George Mynd* and *John Roberts*, the trustees;—*Mansfield* and *Stratford* for several defendants, mortgagees;—*Plumer* for the defendant *Mrs. Skinner*, a mortgagee;—*Le Mesurier* for the daughters of the testator, legatees.

The first question was, whether the mortgages and alienations by *William Mynd* the son, of the

Devise for payment of debts; the trustees convey to A. B.

for the purposes of the trust; *A. B.* mortgages to several persons who have notice of the trust; these mortgages are good.

property demised for payment of debts, were good against the creditors? It was admitted, that the most considerable mortgagees took with notice of the situation of the property.

For the plaintiffs it was argued, that this was a mere trust in *William Mynd* the bankrupt, and that the purchasers were bound to see to the application of the purchase money; *Sir John Cotterel v. Sergeant Hampton*, 2 Vern. 5. *Crane v. Drake*, 2 Vern. 616. and the bankrupt is not to be considered as a devisee in trust to sell; he is the agent of the devisees; he takes with a limited authority, and is in a similar situation with the vendors in the cases cited.

On the other side it was insisted, for the mortgagees, that *William Mynd* the son was substituted in place of the trustees; that his sales were good, and the purchaser not bound to see to the appropriation of the money. *Meade v. Lord Orrery*, 3 Atk. 240. *Nugent v. Gifford*, 1 Atk. 463.

EYRE, Chief Baron.—If the trustees had made these mortgages, they would not have been disturbed; in fact they are made by them; for they have assigned their whole interest to *William Mynd* to act for them in the trust.

Devisees in trust to sell for payment of debts, assign to the son of the deviser, the creditors receive the interest from him for eleven

The next question was, whether the trustees were liable to make good the deficiency arising from the misapplication of this fund? They insisted that the creditors, by lying by for eleven years, during which they treated with *William*

Mynd the son, as their debtor, and knew of the assignment to him, had acquiesced in that assignment, and virtually agreed to discharge the trustees. *Elliot v. Merryman*, 2 Atk. 42. Some of them also came to an agreement with him during that time, by which he agreed to pay them five *per cent.* interest on their debts, instead of four *per cent.* which they formerly carried, and the creditors for several years accepted this augmented interest. This they argued to be a change of the security, and of the nature of the debt, and within the rule laid down in *Elliot v. Merryman*.

years, and agree with him for an increase of interest on their debts; the original trustees continue liable.

The Court held the trustees liable to make good the whole deficiency arising from the misapplication of the fund. They mentioned the case of *Burt v. Dennet*, 2 Bro. Ch. R. 225, as similar.

Mrs. Skinner, a mortgagee upon the trust premises, under a title prior to the devise, having a great arrear of interest due upon her mortgage, in 1778 accepted a bond from *William Mynd* the bankrupt, for the payment thereof with interest, and at the same time indorsed upon the mortgage deed a receipt of the interest up to that time. The bond remained unpaid at the time of the bankruptcy.

A mortgagee takes a bond from the assignee of the devise for the arrears of interest then due, and gives a receipt; the bond is unpaid; the interest is still secured by the mortgage.

The plaintiffs rested on this receipt, and insisted, that by accepting the bond, which was to carry interest, the mortgagee had waived her prior security under the mortgage; upon which, this sum being interest, would not have carried interest as upon the bond. It was at the time of a beneficial

agreement, which she consented to receive as satisfaction of the interest then due.

Plumer, for *Mrs. Skinner*, argued, that the debt continued to be secured on the estate, notwithstanding the bond, which was to be considered only as a security. The receipt would be evidence of payment, if it were not proved and admitted that the only consideration actually received for it was this bond, which could not be held to be satisfaction till discharged. The bond of the son was only as a surety. *Evelyn v. Evelyn*, 2 P. Wms. 664, and the cases there referred to in *Mr. Cor's* note.

He also argued, that this bond should be tacked to the mortgage, and carry interest against the estate.

The *Court* held, that the mortgagee was entitled to interest on the mortgage notwithstanding the indorsement.

The testator leaves assets sufficient to pay all debts and legacies; the legatees receive payment, which the creditors might also have had, if they had demanded it in time; they lie by for 11 years, and the estate is wasted: yet the legatees shall refund.

The creditors claimed, that the legatees who had been paid should refund. This was opposed on the ground of laches in them, as they might have obtained payment of their whole demands if they had claimed from *W. Mynd* in proper time. It is found that the personality wasted by him, and the real estate devised for payment of debts were more than sufficient for that purpose. The legatees have used proper diligence as to their own demands; they had no method of compelling the plaintiffs to sue for theirs, and therefore ought not to be prejudiced by their laches.

The *Court* decreed, that the creditors should be paid the amount out of the legacies received by the legatees, on failure of the other funds.

The daughters of the testator also insisted on the laches of the specialty creditors, as preventing them from coming on the estates devised to the son, upon which their legacies were charged.

The *Court* held that those estates continued liable to the demand of the creditors.

One of the estates devised to the son, was mortgaged by him, a short time before his bankruptcy, to *George Mynd* the trustee, to secure a sum of money, the greatest part of which was due from the testator, the rest from himself.

George Mynd insisted, that as to this mortgage, he was in the same situation with the other persons to whom the bankrupt had aliened his estate, in whom notice of the situation of the property was held not to fix any fraud, so as to defeat their purchases.

On the other side it was argued, that *George Mynd* and his nephew, the bankrupt, transferring to one another the different estates of the testator which had come to each, were to be considered as joining to defraud the other creditors. *George Mynd* must be considered, in this purchase, as knowing that his demand was in danger, and that the fund was insufficient: he goes hand in hand with his nephew in wasting the property to which all the

A devisee of certain estates in trust to sell for payment of debts, assigned to *B.* who wasted the property, *B.* was devisee in fee of other estates under the same will, and conveyed part of them to *A.* to secure a debt due to him from the deviser; the specialty creditors shall take not subject to *A.*'s incumbrance, as the whole is a fraud on the creditors.

creditors have to trust, and can never set up his own demands against them.

The *Court* directed, that *George Mynd's* interest in this property should be subject to the claim of the specialty creditors (upon marshalling the assets,) and to the legacies to the daughters of the testator, which were charged upon it.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

HILARY TERM,

33 GEORGE III.

Mr. Baron PERRYNN was unable to attend the Court during all this Term.

— v. —

*Tuesday,
29th January.*

RICHARDS moved to charge the venue into *Herefordshire*, on affidavit that the cause of action arose in one or both of two *Welsh* counties, to both of which *Herefordshire* was the nearest *English* county.

Refused.

31st January. ATTORNEY GENERAL v. FOYSTER and Others.

Trustees of copyholds in trust for repairing the church of A. and chapel of B. in that parish, by desire of the parishioners bought new ground and built a new chapel, the old being too small and in ruins: this was held not a deviation from the trust, and the trustees were allowed to apply the rents and savings toward it, but not to mortgage the estate.

THE charity upon which this information was brought consisted of copyhold lands in the manor of *Tottenham*. The original deed declaring the uses is not extant, and these are only known by the entry of the surrender of each respective set of trustees to their successors: the oldest of which, in the 28th year of *Ch. II.* is by a surviving trustee to his successors—"to the use of the parish church of *Saint Pancras*, and the chapel of ease thereunto belonging, and to the special intent and confidence that the rents and profits may be laid out to the use of the parish church of *Saint Pancras* and chapel aforesaid, in repairing the same."—Other surrenders are to the same effect;—"to the intent that the rents and profits of the same shall be laid out in repairing the said church and chapel of ease to the same belonging," &c. and admissions of succeeding trustees to the same effect; and one surrender was in these words: "To the use and behalf of the parish church and chapel thereto belonging, in and about repairing the same, and *otherwise for the benefit thereof*."

In 1779, the trustees found the chapel so ruinous as to be no longer capable of being repaired; they therefore called a vestry of the parishioners, at which it was agreed to build a new chapel, and to buy a piece of ground for that purpose. At this time there was an accumulation of rents of the estate, to the amount of 678*l.* mostly vested in the South

Sea Annuities, The trustees bought a new situation, and built the present chapel, which was much larger than the former ; that part of the parish in which the chapel stands (*Kentish town*) being much increased in population.

The whole expence incurred, amounted to about 2670*l.*; to defray which the trustees had expended the former savings, and had sold the old chapel and the ground of it, and let out the seats and pews in the new, (whereas the old was open to all the parishioners,) and were in treaty to mortgage the trust premises, in order to reimburse themselves for the money they were out of pocket, and to finish the chapel, which was not yet quite fitted up within.

In all these transactions, the trustees acted by the direction of the inhabitants assembled in vestry, and appeared to have conducted themselves with great integrity and zeal for the good of the parish.

The present information was at the relation of four or five of the parishioners ; and prayed an account of the trust, and that the defendants might be decreed to replace the South Sea Stock and other savings which they had so expended ; and that it might be declared, that the future rents are not liable to any of the debts incurred by these transactions, or to replace the money expended by the trustees therein ; and that they might be enjoined from raising money on the premises by fines for long leases, or by mortgages, or otherwise.

This cause was argued in last Easter Term, by the *Attorney General*, the *Solicitor General*, and *Johnson*, for the information; and by *Burton*, *Richards*, and *Jones*, for the defendants.

For the plaintiff it was argued, that this estate is limited in its application, to the periodical repairs of the church and chapel, and from which uses the parish are not at liberty to deviate. *Attorney General v. Bishop of Oxford*, 1 Bro. Ch. R. 444. (n) — *Attorney General v. Margaret and Regius Professors, Cambridge*, 1 Vernon 55. — *Ex parte Bolton School*, 2 Bro. Ch. R. 662.

Here the purpose of the trust is not at all complied with: in the old chapel the seats were common; in the new that privilege is taken away from the parishioners. In the old, marriages could be solemnized: but the new is, by the change of situation, deprived of that benefit.

The enlarging the chapel on account of increased population could not have been considered as repairing, even if only making an addition to the old chapel; and the new ground purchased is also quite foreign to the idea of repair.

If circumstances render the original intention of the trust impossible to be complied with, the deviation should be as little as possible: and if rebuilding became absolutely necessary, it should have been on the old spot. This doctrine of *cy pres* is recognized in the case of *Foy v. Foy*, cited in 3 Bro. Ch. R. 591. The buying ground and

building is held so different from any repairs, that a bequest for the latter is good, notwithstanding the mortmain act. *Vaughan v. Farrer*, 2 Vez. 182. but the former is bad. *Attorney General v. Bowles*, 3 Atk.806.—*Attorney General v. Nash*, 3 Bro. R. 589.—and *Attorney General v. Tindall*, Amb. 614.

The agreement of the parish could not give authority to squander more than the growing rents. The parishioners are not properly the *cestui que trusts*; they have only the advantage of this charity in a particular way; and as the parishioners at a future period will have the same claim, the present inhabitants cannot use more than what becomes due in their own time, even in repairs.

The accumulated rents must be considered as an addition to the original estate, and liable to the same trusts; and although there may be a doubt whether this might not fairly have been applied in repairs, at least it is inapplicable to the purpose of building a new chapel; especially as by this means it defeats the intent of the charity, to repair the church also, which must thus go without repairs, if the whole fund is wasted in the new chapel.

For the defendants it was argued, that the general design of the charity is for accommodation of the parishioners, in the church and chapel; and when that accommodation cannot be attained by repairs, as must at some time or other happen in all buildings, it impliedly authorizes rebuilding. If the trustees, finding that the state of the chapel

prevented their applying the rents to the express purpose of repairs, had come to a Court of Equity for directions, the Court would have decreed exactly what the trustees have done; and although the want of such authority might have been a reason for an injunction against their proceeding in the building, it can be no reason for punishing them now when it is done. *Attorney General v. Green*, 2 Bro. Ch. R. 492.

The identity of the chapel is not destroyed by the change of situation, and therefore that can make no difference. The rebuilding is not only necessary in order to preserve the chapel at all, but is the cheapest plan for the trust. The attempting to keep it up by constant repairs, would drain the fund so as to be of no assistance to the church; whereas, after rebuilding, the chapel will not require repairs till again ruinous.

ELYRE, Chief Baron.—This case has been argued as if the church and chapel were originally built from this fund; but on the contrary, both must have been in existence before the bequest to repair them. The keeping them up is therefore a burthen on the parish, independent of the charity; and there can be no necessity to infringe on the principal sum by mortgage or otherwise for that purpose.

The trustees have acted, in the rebuilding, by order of the parish and as their agents, and not by their own authority as trustees.

The vestry and the trustees have acted as the Court probably would, upon application to them have directed. The trust to repair becoming impossible in its application, the applying the growing rents and savings to the purpose of a building by direction of the parishioners, cannot be objected to; rebuilding is included in a covenant to repair and uphold; and comes as near as possible to the express intent. *Attorney General v. Harrow School*, 2 Vez. 551, is in point to this, and also to the circumstance of the fund, applicable to repair both church and chapel, being applied to the chapel alone.

The purchasing and exchanging lands, letting the pews, and selling the old materials, are all foreign to this information; in these the trustees acted as agents for the parish, without relation to the charity at all. It is impossible for the trustees to cover the whole expenditure out of the trust, because they cannot break in upon the fund destined to be applied, as repairs are wanting from time to time.

HOTHAM, Baron.—I agree that that only can fall upon the funds of the charity, which comes in the place of repairs, to wit, the rebuilding, which I never had any doubt comes within the meaning of the trust.—The other expences must fall on the parish.

PERRY, Baron, concurred, and added, that the defendants would be no losers, because, if they had managed properly, as it appeared they had,

they were entitled to reimbursement by a parish rate.

THOMSON, Baron, of the same opinion.

The Court however chose to reconsider their opinion, and the decree was this day pronounced by

EYRE, Chief Baron.—We before delivered our opinions upon this case, and I have not now much to add.

On such a trust, where we are not bound down by any express declaration of uses, but have to collect the intent from the practice, and the terms of the surrenders, it is reasonable that if the chapel be so decayed as to be irreparable, the fund may be applied to rebuild; and the alteration of the site, for conveniency to the parish, can make no difference.

There may be a question, whether the *fitting up* of the new chapel be properly payable out of the funds of this charity, that not being so immediately analogous to reparations, as the rebuilding is; and if the case were for directions, whether a sum now in the hands of the trustees should be applied to that purpose, we should entertain great doubts upon the subject; but we will not pronounce a decree with such a retrospective effect, as to force the trustees to pay again, out of their own pockets, what they have laid out *bonâ fide*, for the benefit and by the desire of the parish.

As the accumulations and growing rents have been swallowed up in the rebuilding, which we think properly chargeable on that fund, it is unnecessary to go into the account, what part of the expence shall be a charge on the charity, and what on the parish.

We dismiss the bill, as to the prayer, that the defendants should replace the money in the funds; declare that the future rents are not liable to make good any debt contracted for rebuilding; and enjoin the defendants from raising money by mortgage, or other anticipation of the profits, for discharge of such debts: at the same time we think the trustees are entitled, in conscience and honour, to a complete reimbursement from the parish.

In the reply, the *Solicitor General* contended that even if it should appear that the prayer of the bill was quite wrong (as being against the acts of the defendants as trustees, whereas in fact the acts were done by them as agents for the parish,) yet the bill could not be dismissed, if there appeared a possibility of giving any directions about the charity. *Attorney General v. Smart*, 1 Vez. 72. *Attorney General v. Governors of Harrow School*, 2 Vez. 552.

EYRE, Chief Baron. — It is certainly the general rule not to dismiss, where any directions are to be given, even though the prayer be mistaken.

Same day. RANDAL and Others v. HEARLE and Others.

A devise to A. for life, with liberty to leave the same to whom she thought most deserving of it, recommending to her to have a due regard to the testatrix's mother's relations, is not mandatory as to the objects of the appointment.

ELIZABETH DODD died in 1771, and by her will bequeathed unto *Joseph Dent*, since deceased, and *Isaac Dent*, now also deceased, who survived the said *Joseph*, all her personal estate, in trust to convert the same into money, and lay it out in landed or government securities, and to pay the interest to her sister *Mary*, late wife of the plaintiff *Randal*, for life; and by her said will she further directed, "that the said *Mary*, if she pleased, " by will or assignment in her life-time, might give " that her estate to the children born of her body; " and if she died without issue, *it should be in her* " power to leave the same to whom she thought most " deserving of it, recommending her to have a due " regard to the aiding and assisting the relations and " kindred of the testatrix's mother; and should it so " happen that the said *Mary* should die intestate, " and without a regular disposal of her estate, in " that case, the testatrix's executors should have " power to dispose of the same as they should think " proper, having a regard to the testatrix's mother's " kindred." She left the said *Joseph Dent* and *Isaac Dent* executors.

Mary Randal died, leaving a will, which after reciting the will of *Eliz. Dodd*, and that she *Mary Randal* having no children, and thinking her husband *James Randal* (the plaintiff) to be most deserving of the said estate, so given to *Joseph Dent* and *Isaac Dent* by the said will of *Elizabeth Dodd* upon the trusts therein mentioned, " thereby, in

“pursuance and execution of the said power or
“authority given to her in and by the said will of
“the said *Elizabeth Dodd*, bequeathed and left the
“said estate unto her said husband (the plaintiff.)”

She also by her will gave, devised, and bequeathed unto her said husband all other her real and personal estate; and she thereby made the whole of the said estates so given to her said husband, the plaintiff *James Randal*, subject to the payment of several legacies to the other plaintiffs, to be paid within three months after her death, and appointed her husband sole executor.

James Randal duly proved the will; and thereupon the plaintiffs brought this bill against *Isaac Dent*, the surviving executor of *Elizabeth Dodd*, (and afterwards by a bill of revivor against the defendants *Hearle* and *Tinkler* as representatives of *Isaac Dent*,) for an account, to which the other defendants, being next of kin of the said testatrix *Elizabeth Dodd's* mother, were by order of the court added as parties.

This cause was argued by *Selwyn* and *Richards* for the plaintiffs, and *Burton* and *Thompson* for the defendants.

The cases cited for the plaintiff were principally these; *Harland v. Trigg*, 1 Bro. Ch. R. 142. *Wynne v. Hawkins*, *ibid.* 179. *Bland v. Bland*, cited in 2 Bro. Ch. R. 43. *Cunliffe v. Cunliffe*, Amb. 686. A case in Lord *Egerton's* time, cited in *Civel v. Rich*, 1 Ch. Ca. 310. *Palmer v. Scribb*, 2 Eq. Ca.

Abr. 291. *Cary* 30, 31, 22; and the case of *Bull v. Vandy* in the Exchequer, Hil. 1791: that was a bill for a legacy; the will gave a power to *A.* to appoint 100*l.* by will to the plaintiff; *A.* died intestate; the bill was dismissed.

On the other side were cited, *Harding v. Glynn*, 1 Atk. 469. *Eales v. England*, 2 Vern. 469. *Pearson v. Garnet*, 2 Bro. Ch. R. 58. *Massey v. Sherman*, Ambler 520. *Wareham v. Brown*, 2 Vern. 153. *Richardson v. Chapman*, 5 Bro. Parl. Ca. 400.

EYRE, Chief Baron, this day delivered the opinion of the Court. After stating the case.—On behalf of the plaintiffs it is contended, that this is a good execution of the power by *Mary Randal*, and the plaintiffs entitled under that appointment. On the other hand it has been argued for the next of kin, that the power was only to apportion among them, not to appoint to others; and that therefore no apportionment having taken place, the fund is to be divided equally among them. And lastly, the plaintiff *James Randal* claims, that if this shall be held a void execution of the power, the executors of *Elizabeth Dodd*, who had also a power of appointment, being dead, the estate is not disposed of, and reverts to him as administrator of his wife, who was sole next of kin to the testatrix *Elizabeth Dodd*. The effect of which would be to give him this fund, not subject to the legacies left to the other plaintiffs.

Mary Randal had only a life estate; and the devise to such person as she shall think most de-

serving, is a power in her. If the recommendation were to be taken as mandatory, it would operate as a condition ; and then the question would arise between the plaintiff *Randal* and the next of kin of the mother. But if this is a mere recommendation as to the manner of executing the power, without being mandatory, then it will have no more effect on the execution of this as a power, than if the devise had been to *Mary Randal* absolutely, with a similar recommendation as to the manner of disposing of it. The latter is the opinion of the Court.

It is material to observe the distinction in the words of the power given to the sister *Mary* from that given to the executors ; by which, the having regard to the kin of the mother, is left at the option and discretion of the one, but made mandatory on the others.

A direction in a power may be prevented from being a condition, either by the uncertainty of the object, or of the terms of such direction. This then seems to us a sufficient execution of the power ; and the plaintiff *Randal* entitled, subject to the legacies.

Same day.

BETWEEN

THOMAS EVANS and ELIZABETH his Wife, late
ELIZABETH WATKINS Spinster, WILLIAM
MORGAN, and W. POWELL, Plaintiffs.

AND

ELIZABETH CHARLES Widow, JOHN PROBERT
and ELIZABETH his wife, JOSEPH JENKINS,
ANN JONES Spinster, MARY JAMES Widow,
ANN JAMES Widow, EDWARD MEREDITH and
ALICE his Wife, and JOSEPH POWELL and
RACHAEL his Wife, Defendants.

EYRE, Ch. B. delivered the opinion of the Court.

C.F. compounded with his creditors; his widow by her will left a fund to pay the residue of the debts to the compounding creditors "or their personal representatives;" the administratrix of a deceased creditor is entitled beneficially to this bequest, and not the next of kin, nor residuary legatee of the creditor.

THIS case arises upon the following circumstances: *John Heath*, by his will in 1748, after giving some pecuniary legacies, to be paid out of the money due to him from *Charles Floyer*, left the residue of his fortune to his sister *Alice Heath*, and appointed her his executrix. The debt from *Charles Floyer* was 668*l.* secured by bond. He, becoming insolvent, came to a composition with his creditors soon after *John Heath's* death, by which *Alice Heath* and most of the other creditors agreed to accept ten shillings in the pound in satisfaction of their demands. Before receiving this composition, *Alice Heath* died in 1751, and by her will, after some legacies, bequeathed the residue of her property among some of her relations, whose representatives are parties in the cause: she appointed *William Charles* and *William Watkins* her executors. *William*

Watkins, having survived his co-exécutor, *William Charles*, died, leaving the plaintiff *Elizabeth Evans* his daughter, who obtained administration of his effects, and has likewise been appointed administratrix *de bonis non* of *John Heath* and *Alice Heath*.

Afterwards in 1786, *Blanch Floyer*, the widow of *Charles Floyer*, died, having made her will, by which, after reciting the insolvency of her late husband, and her intent to charge her estates with the payment of the remaining ten shillings in the pound to the creditors who accepted the composition, she devised certain estates to trustees in trust to raise a sum of money equal to the ten shillings in the pound given up by them, and to pay the same unto such of the creditors as accepted the composition, "or their personal representatives," rateably and in proportion to their respective debts.

Of the share of this bequest, coming to the representatives of *Alice Heath*, four sets of claimants have appeared :

First, the plaintiff *Elizabeth Evans*, as administratrix of *Alice Heath*, the compounding creditor.

Secondly, the residuary legatees under the will of *Alice Heath*, who claim this as part of her estate.

Thirdly, the next of kin of *Alice Heath* at the time of her death, or their representatives, who insist upon this sum as a part of her property undisposed of by her will.

Fourthly, the next of kin of *Alice Heath* at the time of the death of *Blanch Floyer*, on the ground of this sum not having vested as part of her estate till that time,

Between these claims we have found ourselves very much puzzled to form any determination; and we now decide it rather because it is necessary to award the property to some one, than that we see clearly a superior right in any.

The only question is, who are entitled to take under the description of the *personal representatives* of the creditor. The administratrix contends that that is a mere *descriptio personæ* under which she is entitled; that the testatrix *Blanch Floyer* meant to restore what the composition had taken away; that she is to be considered as throwing this into the mass of the estate, to vest in the legal representative of the creditor with her other property, without any ulterior view as to the distribution of it.

Certainly, whoever is entitled to this fund must claim through her, as having the legal right, and the difficulty is to raise any trust by which she can be bound to pay it over to any other person.

If we revert to the will of *Alice Heath*, there is this absurdity, that we are applying her directions in her will to a fund which did not then belong to her, and which cannot by any possibility be considered as part of her estate at the time of her death. If she had expressly devised this sum, it would have been void for want of interest in her; then no im-

plication can raise a trust in favour of the residuary legatees, where an express devise to them would have been bad; and if they cannot claim under the will, certainly they have no other title.

The next point is, whether either set of next of kin can claim under the statute of distributions, or by any equity analogous to that statute. The personal representative is in general considered as trustee of the property devised from the testator, undisposed of, *as belonging to him*. But of property which never did belong to him, I cannot see that any such trust can be raised, or that the next of kin have any claim. Their right must vest in interest at the death of the intestate if at all; the next of kin therefore, at the death of *Alice Heath*, would be the persons to claim if any could; but at that time this had not vested, nor could ever vest as part of her estate.

Then it seems to follow, as a necessary conclusion, that the legal representative of *Alice Heath* must take this sum for her own benefit, whether that may have been within the intention of the testatrix *Blanch Floyer* or not; if there is no other person entitled as *cestui que trust* of the money, the plaintiff must have it for herself, because no one can take it from her. It is not necessary that an intention in her favour should be expressly shewn by the testatrix. Probably she had no remote intent to define the objects of her bounty, which was meant generally as an act of justice to the estate of the creditor. Has she demonstrated any intent in favour of either of the other claimants? if not, the

rule of law must prevail. The plaintiff is devisee; no implied trust can be shewn in favour of any other person; she must hold for her own benefit.

The case of *Bridge v. Abbott** at first raised a doubt in the minds of the Court. There the *Master of the Rolls* construed the words *legal representatives* as a designation of the next of kin, from the appointment of the testator in their favour, and the exclusion of any other possible intention. If we could say, in the present case, that any person was particularly designed under the words of the bequest, we should find no difficulty in the case; but here there seems to be no possible ground to imply the residuary legatee, or either set of next of kin, as particularly meant to be benefited. We do not therefore mean to dispute the authority of that case; it will stand upon its own grounds. The *Master of the Rolls* rested on the designation of personal representative in the statute of distributions as a ground to construe it in favour of the next of kin in that case: he there observes that it is confined in the statute to the immediate representatives, as the son representing his father, and does not extend to more remote kindred: here the next of kin are collateral.

We find therefore insuperable difficulty to take this fund from the person who answers the designation in the bequest, as personal representative of *Alice Heath*; and decree, that the plaintiff *Elizabeth Evans* is entitled under the will of *Blanch Floyer*.

* 3 Bro. Rep. 224.

MICKLEFIELD v. HEPGIN.

Tuesday,
5th February.

THIS was an action on a wager. The first count of the declaration stated, "that a certain discourse was held between the plaintiff and the defendant of and concerning a certain mark set and subscribed to a certain paper writing, purporting to be subscribed by one *William Thorpe*, with his mark, upon which said discourse, a question arose whether the said mark so set and subscribed to the said paper writing was the mark or signature of the said *William Thorpe*, and was subscribed by him, &c." and thereupon the plaintiff asserted that the said mark was the proper mark of the said *William Thorpe*, &c. The second count was the same, only stating it as an *agreement* instead of a *paper writing*.

A declaration on a wager, whether a certain agreement purporting to be subscribed by *A.* really was subscribed by him, is good after verdict.

After verdict for the plaintiff, *Partridge* moved in arrest of judgment, against which cause was now shewn by

Leblanc, Serjeant, and *Gibbs*.—Two objections have been raised to this declaration; first, that idle wagers between persons not interested in the matter in dispute, were not the proper subject of an action. Secondly, that this wager is in its nature void, as involving the interests of third parties.

EYRE, Chief Baron.—Confine yourselves to the last point, for the first is too clear to admit of an argument; for however contrary to public policy it

may be to countenance idle wagers, the case has been too often decided for us to enter upon it now. The pleadings upon an issue out of a Court of Equity, are by way of a wager, as being a known legal ground of action.

As to the second point, it was argued, that this case did not come within the rule of prohibited wagers, as laid down in any of the cases. That rule is confined by the judgment in *Du Costa v. Jones*, Cowp. 735, to those bets which affect the feelings of third parties, so as to tend to a breach of the public peace: and by the case of the *Earl of March v. Pigott*, 5 Burr. 2805, it appears that a wager is not void merely because it affects the feelings of others; but this wager does not appear on the face of it necessarily to affect the feelings of any third person. It does not appear upon the record that this writing is disgraceful to *Thorpe*, if it be true that he has subscribed it; nor that he is at all interested in character or feeling of any kind, in having it concealed that he did so.

No other person can be said to be interested or affected by what appears on the record, for no other is even hinted at in it. It does not even appear that this was such a writing, that the putting the name of *Thorpe* to it would be a forgery in any other person; and therefore it cannot be said to involve such an accusation.

If indeed, in order to determine this wager, any evidence had been adduced by the plaintiff, tending to bring a third person into disrepute, such evidence

bought to have been rejected ; or if upon the whole case appearing in evidence, this had been proved to be a contrivance between these parties to enter into an inquiry disgraceful to a third person, that would have been a proper ground for a nonsuit, or a motion for a new trial. But after a verdict unimpeached, we must conclude that no such thing appeared on the trial ; and that the trial of this issue *might* have involved matter injurious to some third party is no objection ; for that was over-ruled in the case of *Good v. Elliot*, 3 Term Reports, 693, in which the probability of its doing so was at least as great as in this suit ; and there the case was stronger ; for there a third party likely to be affected was pointed out in the record ; in this case no other person is mentioned.

Partridge, George Wilson, and Harvey, on the other side.—The only question now remaining is, whether this wager affects the interest of third parties, so as to make it void. If this paper be subscribed by *Thorpe*, it must be presumed from its title of an *agreement*, in the second count, to be something by which he is bound to the performance of some duty, to which it was necessary that he should affix his name : then the determination of this wager calls upon him to produce his contracts with other people ; and by the same means all his books or title deeds may be inspected. And if it be clear that no strangers can call upon him to do so, if the whole paper to be produced appear upon the record, it never can be suffered that the ingenuity of a pleader in setting forth only part of the case can make it otherwise ; and enough appears here to shew that this was an

obligatory writing. But it not only affects his interest, but his credit also; for if he has subscribed, and afterwards suffers it to be doubted that he did so, it is disgraceful to him, and therefore is not to be inquired into by the idle curiosity of others.

If this subscription was in fact put there by third persons, it is forgery in them; and certainly the inquiry tends to call in question some person's having dishonestly affixed his name to an agreement.

All these inquiries naturally tend to disturb the peace of society, which is the principle of the decision in *Dacosta* and *Jones*; and it is not necessary that such inconveniencies should actually occur on the evidence. The wager must be good or bad originally, according as it tends to these inconveniencies or not, as was decided in the case of *Atherford v. Beard*, 2 Term Rep. 610; there the wager was held void on this ground, although the defendant had admitted himself to have lost it, so that no inquiry was necessary. And the case of *Cox v. Philips*, Ca. Temp. Hard. 237, is a strong decision that the character of a third party cannot be brought in question by such an action. The case of *Good v. Elliott* only decides that a wager upon indifferent subjects is good; for the Judges expressly go upon this ground, that *S. Tye's* character was not in question, as the decision was referred to her; and the evidence necessary could not be to shew what she *had done*, but what she, when referred to, *said* she had done. Here the criminal fact is the point in issue.

EYRE, Chief Baron.—This case turns upon the manner in which the objection is taken. In a

motion in arrest of judgment, we cannot seek about to impeach the verdict; but the wager must appear to be necessarily void, otherwise we will now presume the verdict right. The wager must at the time of the making of it be either good or bad; but it is from the manner of pleading only, that it appears on the record to be either the one or the other. If the pleadings state only so much of the transaction as is legal, and the other part appears in evidence to be illegal, it is a proper ground of nonsuit, or of granting a new trial; or if put upon the record by means of a special verdict, the Court can decide upon it: but here the wager, as stated in the declaration, does not *necessarily* imply an imputation upon any body. It does not appear whether the agreement was on a subject of importance or merely idle; whether it was executed or executory; whether any person was interested in the agreement, or its subscription; whether it was an original or a copy. If it had appeared on the record, as in *Dacosta v. Jones*, that a third person was necessarily affected in interest or character, it would have altered the case.

The other Barons concurring, the rule was discharged.

Thursday,
7th February.

CORBETT v. BARKER.

Baron and feme seized in fee in right of the feme, mortgage by fine, and afterwards convey the equity of redemption by lease and release to the mortgagee; the mortgagee having remained in possession as complete owner for more than 20 years, during the life of the husband, tenant by the curtesy, from whom he had got his conveyance; the heir of the wife is barred of his equity of redemption by the lapse of time.

THIS was a bill for redemption of mortgaged premises, and for an account of rents received by the defendant, and of the produce of timber cut down and sold by him. The plaintiff's father and mother being seized, in right of the wife, of the estate in question, agreed, in 1739, to mortgage it for 60*l.* to one *Carlisle*; and accordingly a deed of mortgage was executed to him for a term of 1000 years, which deed contained a covenant to levy a fine to *Carlisle and his heirs* of the premises; provided always, that if the mortgagor should pay to the mortgagee, *his executors, administrators, or assigns*, the said sum, &c. then the said term to be void; "which said fine, and all other conveyances of the premises, shall be and enure to the only use of the said *Carlisle*, his *heirs* and assigns, subject to the proviso abovementioned, and to no other uses whatsoever." The fine was accordingly levied, reserving the equity of redemption to the husband and wife and *their* heirs. In 1740 this mortgage was assigned to the defendant, who at the same time advanced 30*l.* more to the father. In *February* 1740 the father and mother of the plaintiff, in consideration of 160*l.*, by lease and release, conveyed their equity of redemption in fee, and covenanted, that all fines, conveyances, &c. should enure to the sole use of the defendant in fee. The defendant, accordingly entered upon the premises, and has continued in possession ever since. In 1741 the mother died; the father died in 1785; by

which the plaintiff contended that this estate descended to him as heir to his mother, subject to the mortgage.

Burton and Scaife for the plaintiff.—The only grounds on which this prayer can be opposed, are,

First, that the fine in 1739 can be connected with the subsequent conveyance in fee, so as to bar the heirs of the wife.

Second, that the length of time during which the defendant had been in possession, would bar the equity of redemption.

As to the first, the mortgage deed is only for a term of years; though the fine is in fee, yet it is to the uses mentioned in the deed; and there is a proviso that on payment, &c. the *term* shall be void; then only the *term* was in the mortgagee, and the fee was a resulting use in the wife from whom it proceeded, and that being vested by the statute, she was immediately in of her old estate as to the fee.

Then, it is impossible that the subsequent conveyance can receive effect from the fine; for being levied to certain uses, and to no other, it was *functus officio*, and there could not afterwards be any new uses declared by any subsequent deed, without the solemnity of another fine; and this seems to have been the principle of the case of *Fleetwood v. Templeman*, 2 Atk. 79.; and a contrary rule would

be very dangerous, for then a husband, having obtained his wife's consent to a slight incumbrance, and procured a fine for this effect, without any opposition from the wife's friends, or the Judge before whom she is examined, may, by a subsequent clandestine declaration of other uses, unfairly obtained from her by his authority, be able totally to make away with her estate, which the solemnity of a fine is meant to prevent.

As to the second point: it is true, that if a mortgagee is in possession for twenty years, and no account of the rents is given or demanded during that time, nor any other circumstance shews that he considers himself as only a mortgagee during that time, Courts of Equity will not disturb his title. But the title of the plaintiff did not accrue till 1785, and this rule of equity is to be taken like the statutes of limitations at law, that is, with a proviso in favour of all who are necessarily obstructed from claiming their rights. It is true, the Court has sometimes indulged a remainder-man of an equity of redemption, with liberty of redeeming the mortgage, where the tenant for life neglecting to keep down the interest, the mortgagee threatens to get into possession: but that is not compulsory on him, as it is on the tenant for life; and therefore he has not forfeited his equity.

Besides, in order to obtain an absolute title through length of possession, it is necessary that that possession should be adverse; whereas here the mortgagee is in through the tenant by the cur-

tesy; for the lease and release, although insufficient to convey the estate in fee, was valid against the husband to convey all his right in the premises,

The tenant by the curtesy was bound to keep down the interest; and if he had actually done so, there could have been no pretence to dispute the plaintiff's title: but in fact, by this conveyance, the mortgagee is in the place of the tenant by the curtesy, and is therefore subject to the duties of that character, and among them, to that of keeping down the interest; he must therefore be considered as having done so, and as having paid the one hand with the other; as otherwise he will be benefited by his own wrong; the adverse possession is therefore only since the death of the tenant by the curtesy in 1785; and although he cut down timber, and otherwise acted as complete owner, yet that cannot give him any absolute estate, if he had it not before.

Romilly, on the other side, argued that the bill could only reach one half of the estate; for as the fine saves the equity of redemption to the husband and wife, and *their* heirs; one half was therefore vested in him, and passed to the defendant; but, by

THOMSON, Baron.—It has often been ruled that a reservation of this kind, in a fine, levied completely *diverso intuitu*, shall not, without an express declaration of such intention, carry the estate in a new channel; nor even if it had been to the husband and his heirs only.

in Chancery,
does not require
a teste; and if
the teste is re-
pugnant and
impossible, it
shall not vitiate.

Lord Viscount Dunblane,) the *Earls of Roseberry*
and *Deloraine*, and the *Lords Sinclair, Lindores,*
and *Fairfax*, the question turned upon the vali-
dity of the several writs produced to certify that
these peers had qualified themselves to send prox-
ies according to the directions of the statute
6 *Anne*, c. 23.

By that statute, section 3, it is enacted, That all
the peers who meet on the royal proclamation, shall,
before they proceed to the election, and in the pre-
sence of the peers assembled for such election,
take the oaths, and make, repeat, and subscribe
the declaration mentioned in the act.

Section 4. " And that such peers that live in
" *Scotland*, but shall not be present at such meet-
" ing so appointed, may take the said oaths, and
" make and subscribe the said declaration, in any
" Sheriff's Court in *Scotland*; and every sheriff, or
" his deputy, before whom such oaths and such
" declaration shall be so made, subscribed, and
" repeated, shall, and is hereby required to return
" the original subscription of such oath and decla-
" ration, signed by the peer who took the same,
" and make a return in writing, under his hand and
" seal, to the peers so assembled, of such peers
" taking the said oaths, and making and subscribing
" the said oath and declaration; and such peers shall
" be thereby enabled and qualified to make a proxy,
" or to send a signed list, containing the names of
" sixteen peers of *Scotland* for whom he giveth his
" vote; and such of the peers of *Scotland*, as, at the
" time of issuing such proclamation, reside in *England*,

“ may take and subscribe the said oaths, and make,
 “ repeat, and subscribe the said declaration, in her
 “ majesty’s High Court of Chancery of England, her
 “ majesty’s Court of Queen’s Bench, Common Pleas,
 “ or Court of Exchequer in England; which being
 “ certified by writ to the peers in Scotland at their
 “ meeting, under the seal of the Court where such
 “ oath and declaration shall be made, repeated, and
 “ subscribed, shall be sufficient to entitle such peer to
 “ make his proxy, and to send a signed list as afore-
 “ said; and in case any of the said peers of Scot-
 “ land, who, at any time before the issuing of
 “ such proclamation, have taken the said oaths,
 “ and made and subscribed the said declaration, in
 “ *England or Scotland*, to be certified as afore-
 “ said, and, if taken in parliament, to be certified
 “ under the Great Seal of *Great Britain*, shall at the
 “ time of issuing such proclamation, be absent in the
 “ service of her majesty, her heirs or successors, such
 “ peer may make his proxy or send a signed list.”

The instrument produced at the late election, as
 the writ to certify that the Lord Viscount Dum-
 blane had taken the oaths in Chancery, (and to
 which those of the other peers above mentioned
 were similar,) was in the following words:

“ *George the Third*, by the grace of God, of *Great*
 “ *Britain, France, and Ireland*, King, defender of
 “ the Faith, and so forth: To our most dear
 “ Cousins, the peers of *Scotland*, to be assembled
 “ and met at *Holyrood-house in Edinburgh*, on Satur-
 “ day the twenty-fourth day of *July next ensuing*, by
 “ virtue of our proclamation under our Great Seal

“ of *Great Britain*, lately issued for the election of
 “ the sixteen peers of *Scotland*, to sit and vote in
 “ the house of peers in the parliament of *Great*
 “ *Britain*, to be holden at *Westminster* on *Tuesday*
 “ the tenth day of *August next ensuing*, Greeting.
 “ We have inspected a certain record and register
 “ in our Court of Chancery in *England*, made and
 “ fyled, and there remaining, by which it is mani-
 “ fest, that on *this fourteenth day of June, one thou-*
 “ *sand seven hundred and ninety, Francis Viscount*
 “ *Dumblane* personally appeared in open Court in
 “ the Chancery aforesaid, and then and there took
 “ and subscribed the oath of supremacy, and re-
 “ peated and subscribed the declaration contained
 “ and specified in a certain act of parliament made
 “ in the sixth year of the reign of *Anne*, late queen
 “ of *Great Britain*, intituled, “ An act to make
 “ further provision for electing and summoning
 “ sixteen peers of *Scotland* to sit in the house of peers
 “ in the parliament of *Great Britain*, and for trying
 “ peers for offences committed in *Scotland*, and for
 “ the further regulating of voters in election of
 “ members to serve in parliament :” and also took
 “ and subscribed the oath of allegiance contained
 “ and specified in a certain act of parliament, made
 “ in the first year of the reign of our late royal
 “ great grandfather *George the First*, late king of
 “ *Great Britain*, intituled, “ An act for the farther
 “ security of his majesty’s person and government,
 “ and the succession of the crown in the heirs of
 “ the late princess *Sophia*, being protestants, and
 “ for extinguishing the hopes of the pretended
 “ Prince of *Wales*, and his open and secret abet-
 “ ters :” and also took and subscribed the oath of

“ abjuration contained and specified in a certain
 “ act of parliament made in the sixth year of our
 “ reign, intituled, “ An act for altering the oath
 “ of abjuration and the assurance, and for amend-
 “ ing so much of an act of the seventh year of
 “ her late majesty queen *Anne*, intituled, An act
 “ for the improvement of the union of the two
 “ kingdoms, as after the time therein limited re-
 “ quires, the delivery of certain lists and copies
 “ therein mentioned to persons indicted of high
 “ treason or misprision of treason ;” according to
 “ the form, direction, and appointment of the
 “ acts aforesaid. Witness ourself at *Westminster*,
 “ the twelfth day of June, in the thirtieth year of
 “ our reign.”

The *Solicitor General* and *Erskine* took two objections to this writ: first, it describes the time of the appearance in Chancery to be on the 14th day of *June* 1790, without any reference to the year of our Lord; so that the house cannot legally understand to what the numbers 1790 refer; and then there is no date to the appearance. Secondly, the date is impossible. The writ itself bears date on the 12th *June*, and certifies a fact to have happened on the 14th *June*, two days afterwards.

The peer must take the oaths as a necessary part of his right to vote ; it is therefore requisite to ascertain by the proper legal proof, that he has acquired a right to the franchise by complying with the act. The oaths must be taken within a limited space, between the proclamation and the election. The time is therefore an essential part

of the certificate. The certificate must be such as the Clerk Register in *Scotland* was bound to attend to and admit as conclusive evidence of the peer having entitled himself to the franchise. Here the officer was bound to suppose that the appearance in Chancery was prior to the writ, and therefore should apply the date of the 14th of *June* to the year preceding. But that is not within the time specified by the act.

The teste of the writ is necessary, and if bad the whole is vitiated. *Thel. Di. l. 10. c. 22. s. 2—4. Simpson v. the Inhabitants of Penrith*, 1 Show. 80. 1 Roll. Abr. 200. pl. 3. The date of a record is not to be contradicted, but must always be supposed to be true. *Plowd. 491. 231.* The only case where the date is not considered as binding, is where the course and practice of any of the Courts of *Westminster Hall* have established a contrary rule in any particular instance, as in the case 2 Burr. 944.; but it cannot be contended that such usage applies to the present case, or that the returning officer in *Scotland* could legally disbelieve the writ under which he acted.

Besides, unless the teste of the writ is adhered to, the writ is imperfect; it is addressed to the peers to be assembled on the 24th *July* "*next ensuing*," to elect sixteen peers for the parliament to be holden on the 10th *August next ensuing*; next ensuing what? The teste: Then the whole writ refers to it, and if it falls, it no longer appears to whom the writ is addressed, nor for what parliament it is to be produced.

Bower and *Adam* on the other side.—The contradiction between the two dates must have occurred to the officer; they cannot stand together; let him reject either, and the writ is good. If the teste is rejected, it is then a certificate, without a date, that Lord *Dumblane* did appear and take the oaths within the time limited. If the date in the body of the writ is rejected, it is then a writ dated on the 12th *June*, that the peer has taken the oaths according to the directions of the act of parliament; and as the proclamation issued on the 11th *June*, that would be a good certificate of his having appeared since the issuing of the proclamation.

It is not necessary that such a writ as this should have any teste at all, if the time of taking the oaths appear in the body of the writ. In common writs a teste is necessary, because it contains no other date, and the return is to be calculated from the teste; but no such reason occurs here: it is a writ only in name, as it neither commands, nor authorizes, nor prohibits any thing, which a writ always does; and it has no return: the reason therefore why a teste is used in other writs does not apply to this; and it is to be considered as merely useless and surplusage in the present instrument; and as such is to be rejected. *Coddington v. Wilkin*, Cro. Jac. 377. *anon.* Hardr. 330.

The want of the words, “in the year of our “Lord,” is immaterial, *Holman v. Burrow*, 2 Salk. 658. as they are implied: so in most acts of parliament the year is stated in this general manner.

The *Solicitor General* in reply.—If either date is to be rejected, that in the body rather should, for it now stands an instrument with a possible date, certifying an impossible fact; and the want of a date to the appearance in Chancery cannot be helped by the general words; for by the same reasoning the writ might be reduced to a mere certificate of the peer having complied with the act without saying how. Besides, he might have taken the oaths before going abroad on his majesty's service, and then the act would be complied with without reference to the time. As the peer is not abroad, the time becomes material, and must be certified.

This House is to decide now, whether the conduct of the returning officer in *Scotland* was right or wrong. If he could reject one date, he might reject the other; and two peers, having opposite mistakes in their writs, might call upon him to reject the two different dates as it suited their cases, the one rejecting the teste, the other that in the body of the writ.

The *House* desired the opinion of the Judges, whether the instrument in question was a valid writ within the meaning of the act.

EYRE, Chief Baron, this day delivered the opinion of the Judges to the House.

The point proposed to us by your Lordships is, whether the instrument in question is a writ sufficient in law to certify, according to the statute of the 6th of Queen *Anne*, that *Francis Viscount*

Dumblane, on the 14th day of *June* in the year of our Lord 1790, appeared in Chancery, in open court, and took and subscribed the oaths and declaration therein mentioned. We have considered this question, and have agreed upon an opinion, which I am now to report to your Lordships, with such reasons as have suggested themselves to me in support of it.

The question describes fully the nature of the subject to which it relates; it refers to the 6th of *Queen Anne*, which contains a provision for electing sixteen peers to represent the peerage of *Scotland* in the parliament of *Great Britain*; the 4th section of which statute prescribes the mode in which peers who are absent are to take the oaths which it requires.

Two objections have been stated against the instrument which certifies the compliance with this regulation in the present instance.

First, that in the body of the instrument the time when the oath is said to have been taken is not expressed with sufficient certainty, the words "one thousand seven hundred and ninety" not having any reference to the year of our Lord.

Second, that the instrument certifies the substance of the record of an act done on the 14th of *June*, while the instrument itself bears date on the 12th of *June*, two days before; that it certifies a fact to have happened subsequent to its date, which is a physical impossibility, and therefore that the instrument is a mere nullity.

The purpose of the objections is to make the misprision of an officer of a Court of Justice operate to destroy a valuable franchise, which this act of the Court was meant by the statute to facilitate and give effect to. The law, though it delights in certainty and precision, so far as is necessary for the purposes of justice, always tends against objections of form which are raised to defeat right and operate against its purposes; and calls for a liberal interpretation to intend every thing it can to avoid repugnancy, and where there is an apparent repugnancy, to reject the repugnant part as surplusage. The rule with respect to surplusage is universal, for though there are some old cases where it was held that surplusage could not be rejected, yet later cases have established the rule, that surplusage is always to be rejected where there is a repugnancy.

In the interpretation of instruments, the law has adopted different degrees of liberality according to the subject. Words used by ignorant men, in wills for example, receive a liberal interpretation. Juries in their verdicts, and the legislature in acts of parliament, use words in their vulgar acceptance. Even in legal proceedings, the allegations of parties are to be construed according to the common import of the words. In deeds the language is more techpical, but still not so as to exclude liberality of interpretation. In criminal proceedings, in the writs of Courts, whether original or judicial, there is more precision, and greater strictness is required; but still the law leans to the maxim, *ut res magis valeat quam pereat*.

These objections are *stricti juris*.—According to the 6th Queen *Anne*, the appearing in court and taking the oaths, entitles the peer to the exercise of his franchise; and this instrument purports to be a writ under the Great Seal of the Court of Chancery, by which it is intended to be certified that the act, which the statute requires as necessary to the exercise of the franchise, has been performed. But it is difficult to find out under what class of writs the present is to be placed: it has the form and name of a writ, but does not in its nature fall under any one class of writs. We have found no precedent for such a writ in the Register. It commands nothing, delegates no power, is not returnable. Though Courts may exercise a judgment as to the rejecting of writs if null, or if they are not according to the description of the classes to which they belong, yet in regard to this writ no Court has power over it; it approaches nearest to an exemplification; yet it does not contain an exemplification of the record it is intended to certify.

The truth is, that this act has been penned without sufficient attention to the nature of our writs: it was to be in the king's name; we have no notion of a writ that is otherwise. The first framers seem to have found a difficulty in making the king certify the fact. They have substituted his certifying an *inspeximus* of a record with the king's sense of that record, and without giving an exemplification of it, which would have given certainty to the fact of which the record is evidence.

We have doubts whether this writ, in its present form, satisfies the meaning of this clause of the statute; but it is too late to state this objection now, for the writs, from the period of this statute downwards, have been in the same form with the present, and *communis error fecit jus*.

Perhaps the proper form would have been something of this nature: "Know ye, that on a certain day the Lord Viscount *Dumblane* appeared and took the oaths, &c." There would have been then no absurdity if the instrument had stated that the noble person had taken the oaths; but it is here said that the king has inspected a record where it appeared that the oaths were taken; this refers to the certificate of the record; and in an instrument of this nature the recital of the contents of the record may be expressed more generally than the record itself; it is only a description of the record, and requires nothing more than to be intelligible. In the record the date is probably expressed with technical propriety, *in the year of our Lord 1790*; but we hold it to be sufficient that the date is expressed in such manner as has been done in acts of parliament; and it has been adjudged that a date expressed in this manner is sufficiently descriptive of the year in an act of parliament, particularly in the act 9th of Queen *Anne* against gaming.

The second objection is, that there is such a repugnancy between the teste of the writ and the day mentioned in the body of it, on which the fact is

certified to have happened, as to make the fact certified an utter impossibility.

It seems impossible to deny that there is an apparent repugnancy ; but this assumes that the writ was sealed and issued on the 12th *June* ; if it was not issued till the 14th, there is no longer any repugnancy. In all cases the teste is not of the essence of the instrument ; dates originally were not necessary ; they are not necessary to deeds : even in writs, Courts of Law, though they require that they should have a teste, do not require that it should be of the real date ; and the technical testes of writs are often false in fact.

Writs do in truth issue in the vacation, but bear teste on the last day of the preceding term ; and that even where the cause of action has arisen subsequent to the day on which the writ bears teste ; as happened in the case reported in Hardr. 126. In that case Sir *James Bagg*, the defendant's father, being an accountant and indebted to the king, died in *August* ; after his death a writ of *diem clausit extremum* issued, bearing date the last day of the preceding Trinity Term ; the repugnancy in this writ was not apparent ; but the Court being informed of the day of Sir *James's* death, and this being stated as an objection, they held the writ to be good as being conformable to the usage of such writs, which never bear teste in vacation time, but on the last day of the preceding term. Yet the teste and the fact there had the same repugnance as in this case : the only difference is, that there the repugnance was not apparent, while here it appears

on the face of the instrument. We do not hold this difference to be essential. If the repugnancy may be reconciled by the usage of the Court, there is no longer any physical impossibility of the fact. If the teste does not conclude as to the time at which the writ was sealed, then it does not form any repugnance so as to make the instrument null.

If this writ had issued out of the Court of King's Bench, Common Pleas, or Exchequer, the teste would be right; as being out of Chancery it may be wrong, because it is always open, and therefore there is no necessity for giving writs issuing from Chancery a teste different from the day on which they really issue; but this is sometimes necessary, even in Chancery, as in the case of a writ of *mittimus*, which can only be certified to the King's Bench in term time.

If a writ having such a teste and such a date in the body of it had issued in judicial proceedings, it might have been quashed, it might have abated, or errors might have been assigned upon it, yet still it would have its effect till quashed or avoided. This is not a writ in judicial proceedings, but it is examinable only by the Court from whence it issued; shall it not then have its effect till it is quashed, and shall the Clerk Register, the returning officer, be allowed to quash it and refuse giving effect to it?

But there is another answer. The material part of the teste is, that the writ was sealed after the oaths were taken. If the teste be repugnant to

the date in the body of the writ, why may not the teste be rejected as surplusage? If the teste is necessary, it cannot be rejected; if it is not necessary, it may be rejected. But it may be asked, why should we reject the 12th rather than the 14th? The answer is, In order to support the writ.

Original and judicial writs, no doubt, have dates, and the teste is often essential; they may be returnable within a certain number of days after it; they may be in force a certain time; they may bind property from their dates; but this is not true as to all cases, as in 1 Leonard 9. where a writ issued in the 25th and 26th *Eliz.* under the Privy Seal, was found to require no teste; so in this writ the date is not essential for any purpose.

We see no reason to pronounce, that an anomalous writ of this kind must have a date, or that the date must be adhered to, to the effect of avoiding the instrument; if it can exist without a date, then there is no question, for we will reject the repugnancy to support the instrument.

We answer that the instrument in question is a sufficient writ for the purpose mentioned in the question of your Lordships.

Friday,
8th February.

THE MAYOR, &c. of LONDON v. AINSLEY.

The bill prayed a discovery whether the defendant had not contributed to the expence of a suit to try a general question against them. It appeared that by the course of that suit in evidence, no general right could be bound by it. A demurrer was allowed.

THE bill was for an account of all coals imported into the port of *London* by the defendant, and stated that there is an ancient toll payable to the city, of one farthing on every chaldron of coals imported into the port of *London*, being the property of persons not freemen; that the defendant is a freeman and coal factor, selling by commission coals imported, the property of others not freemen, and hath always debited the coal owners with this toll, under the title of the Mayor's Farthing, although he never paid it to the plaintiffs; that he and *John* and *R. Clarke* and others, being also freemen and coal-factors, claimed a right, as freemen, to receive the amount of this toll from the coal owners their consignors, and retain it, without being subject to render an account to the plaintiffs of such receipts.

The plaintiffs in order to contest this claim, commenced an action against the *Clarkes* in the Court of Common Pleas, for money had and received by them to the use of the plaintiffs, and on an account stated; upon the trial of which before Lord *Loughborough* at the sittings after *Easter*, 31 *Geo.* III. the plaintiffs gave in evidence an answer put in by the *Clarkes* to a bill in Chancery, filed against them in 1787 by *Fenwick* and other coal owners for an account of money surcharged, by which answer the *Clarkes* admitted themselves to have charged the farthings, although they had never paid them, and claimed to be exempt; and gave as

the reason, that the city disputed their claim of exemption, and threatened to claim the toll from them, in which case they would be compellable to pay to the city all the dues charged in the account. It was assigned as a reason for charging these dues as actually paid, that the uniform practice of freemen factors was so to do, it having been understood or allowed, that the privilege of the consignee should exempt the consignor from the charge of the dues, in the accounts between themselves. The bill then stated that the *Clarkes* not being able to make out a title to retain these dues, the plaintiffs had a verdict; that that suit was defended at the joint expence of all the freemen coal factors; with a view to dispute the right of the plaintiffs; and the bill sought *inter alia* a discovery from the defendant, whether he the defendant did not join or assist in, or contribute to the defence of, the said action, or was not in some and what manner concerned therein.

To this discovery the defendant demurred, and for cause, shewed that a discovery of such matter might tend to charge him criminally.

The demurrer was argued this day by *Burton* and *Romilly* for the defendant; and *Newnham*, the *Recorder*, and *S. C. Cox*, for the plaintiffs.

For the demurrer it was argued, that this must either be maintenance, and then the discovery sought is to accuse the defendant of criminal matter; or the contributing to the defence of the *Clarkes* was lawful, and then the discovery is irrelevant; and in either view the demurrer will hold,

as in the case of *Oliver and Bakewell* in this Court last term.

By the *Court*.—There is another ground for the discovery in this case, which did not appear in that; here the plaintiffs want to fix the defendant with being a party to the former suit, by discovery of his joining in the expence of it, and so to give it in evidence as a decision in their favour on the present question.

To this it was answered, that from the nature of the former suit, it was impossible that any general right could be determined by it; for it was decided upon the admission of the *Clarkes* in their answer in Chancery, that they held the money only as trustees for the city, and liable to be called upon by them for the amount. But the admission of the *Clarkes* cannot affect others; nor can that decision therefore be read as evidence against the defendant here, notwithstanding his having contributed to its defence; and as he could not be interested in the decision, his joining in the expence of defending it is maintenance. *Lord William Howard v. Bell and others*, Hob. 91.

On the other side it was argued, that this was not maintenance; as being a question on a right claimed in common by *Clarke* and the defendant, he was entitled to join in the expence of litigating it, 1 Hawk. P. C. 539, and the cases there cited. The right claimed in that case was substantially the same as in this; that a factor having received the farthings has a right to retain them: and even the question

in the former case had gone off upon a collateral point, arising from the answer in Chancery; yet the colour of a common interest would be sufficient to protect the defendant from a criminal prosecution for maintenance: and the answer of the *Clarkes* admitted nothing that is not substantially stated in this bill; so that they are in exactly the same situation; and if the defendant contributed to that suit, it is a decision against him, and evidence in this cause.

EYRE, Chief Baron, thought that there might be other criminal matter involved, as the *Clarkes* seem to have been guilty of cheating either the coal owners or the city; and this discovery may make the defendant liable as his associate; and suggested an opinion, that if a freeman in the city colours a foreigner's goods, he is punishable with loss of his franchise.

To these objections it was answered, on behalf of the plaintiffs, that the colour of right would save in both cases; and as to the latter, if there is such a rule, it must be through some bye-law which ought to have been introduced into the case by a plea, and cannot be taken advantage of on demurrer. To this the Court agreed.

EYRE, Chief Baron—The suit against the *Clarkes* could not be a general question: it turned on their admission of having received the money for the city, and being liable to account for it. Even if they had on other grounds a right to retain, yet, their having received it on this false pretence, was held

sufficient to charge them. Even if the defendant here has used the same false pretences, that does not so unite them in interest as to make the judgment against the one evidence against the other, notwithstanding it was defended at their joint expence: then the discovery sought will not avail to this purpose, which is the only ground on which it could be supported.

The other Barons concurring, the demurrer was allowed.

*Saturday,
9th February.*

THE KING v. BLATCHFORD.

A debtor of the crown may gain a priority for his own demand before other creditors by extent, although it is sworn that the crown is in no danger; and the Court have no discretion to prevent him.

A RULE had in the preceding term been obtained by *Rous*, to shew cause why the extent issued against the defendant should not be set aside on the following case.

Blatchford, a country banker, was security to the crown for *Shaw*, the receiver of the county of *Surrey*. *Blatchford* was indebted to *Shaw* in about 6000*l.* and to other persons to a large amount; *Shaw*, who was in arrear that sum to the crown, got an extent issued against himself, and this debt being found by inquisition, took out this extent in aid against *Blatchford*, on affidavit that he was the original creditor, and that his demand was in danger from *B.*'s circumstances. *Blatchford* imme-

diately afterwards became bankrupt; and this motion was made on behalf of the creditors, on the ground that the whole proceeding was merely in order to obtain an unjust priority for *Shaw* over them, upon affidavits that the crown was in no danger, *Shaw* being completely solvent, and not more in arrear than receivers in general are.

Cause was this day shewn by the *Attorney General*, *Burton*, *Plumer*, and *Wigley*, for the crown. The principle upon which the decisions of the Court have gone in cases of extent, is, that in the first place the revenue of the public must be secure. The prerogative process takes a priority before all others, and attaches upon subjects which no other process can reach. On an extent there are three species of property liable: the real estate, personal estate in possession, and choses in action; these jointly constitute the fund out of which the crown is to be satisfied, and it therefore is the interest of the crown to preserve each when in danger; and although one individual may be benefited and another damnified by it, the public interest alone is to be considered.

Accordingly, the universal practice appears to be, that upon reference to the officer, the original debtor is allowed to take out the extent, upon an affidavit similar to the present; and this also appears by the cases, *Rex v. Gibbons*, Bunb. 24. *R. v. Clarke*, Bunb. 221. *R. v. Taylor*, Bunb. 127. *R. v.ENDERUPP*, Bunb. 134. If the creditors of *Blatchford* have a right to object to the crown's debt being paid out of that part of the fund on which they have

a lien, so may all who have liens on other parts of *Shaw's* property, as mortgagees on his real property, object to that being seized; and it would be absurd to expect the immediate debtor of the crown to swear that the debt of the crown is in danger, or that he himself is in insolvent circumstances. It is sufficient if he swear that this part of his funds is in danger.

This right in the debtors of the crown being abused by their buying up debts due to others, the rules 15 C. I. provide, that no such extent shall issue, without affidavit that the debtor to the crown is the original creditor. This sufficiently shews the general principle.

Rous and *Russel*, on the other side.—The crown has certainly such a right as contended for; but it is the business of this Court to see that this process is not abused to the ends of individuals: for the 33 H. VIII. c. 39. s. 74, gives priority only to process for the king's debt; and in 2 Str. 759, the Court express great care that it shall not be carried beyond the intent of the statute.

The practice certified by the officers, and the cases, only prove that without any affidavit of the fact, the Court will presume that the crown will be more secure by payment of the debts due to its debtor, and therefore take care of the interests of the crown, by an extent in aid: but in the present case, that presumption is negatived; the affidavits, which are not disputed, expressly state that the principal debtor has other sufficient effects; so that

the crown is in no danger, and can gain no additional security by this extent in aid.

It is expressly provided by Magna Charta, (1 charter of King *John*, l. 5. and of *Hen.* III. c. 8,) that the goods of the surety shall not be taken as long as the principal debtor is sufficient. In the case of the *Queen v. Quash*, Parker 281, it was ruled, an immediate extent shall be preferred before an extent in aid; evidently considering the latter as the suit of an individual, the former, of the crown. And in the case of *Capel v. Brewer*, 1 Vern. 469, where the circumstances were similar to the present, the original debtor of the crown, who had gained an unfair priority by this means, was obliged to refund with costs.

EYRE, Chief Baron.—This motion is contrary to the established rule and practice of the Court. The debtor of the crown has a right to gain this priority for debts *bona fide* due to himself, and it would be very mischievous to the crown if it was otherwise; for the ability of its debtors constitutes its security, and depends on the money due to them being paid. And as the custom is too common of receivers lending out the money of the crown on speculations, this in most cases will only have the effect to regain the property of the crown itself.

The stat. of Magna Charta and the cases cited, are where the extent is against the surety, which is properly called an extent in aid: but here it is against the debt, as being part of the effects of the principal the debtor, and is in nature an immediate

extent, although not against the immediate debtor of the crown.

This rule gives no right which did not exist before, but only gives a quicker remedy for that right. Priority among creditors is *stricti juris*; the plaintiff has a priority obtained without any fraud; we cannot take it from him; and even if we were inclined to exercise our discretion, we are bound to let the extent go: for the hardship on the creditors cannot weigh against the express rights of another person.

HOTHAM, Baron.—I have always thought that we had no discretion upon the subject, but are bound by the statute.

THOMSON, Baron, of the same opinion.

The rule was discharged.

Same day.

THE ATTORNEY GENERAL v. DENNIS.

A tanner selling hides by retail, whole or in pieces, is not within the penalties of the 24 Geo. III. c. 19.

THIS was an information on the 24th Geo. III. c. 19. for that the defendant being a person using or exercising the mystery or trade of tanning leather, did, during the time that he so used the said trade or mystery of a tanner, occupy, exercise, and use the craft or mystery of an artificer using and exercising the cutting of leather.

The statutes upon which the information was founded, are 1 *J. I. c. 22.* which recites to be made for the purpose of establishing and carrying on a proper course of currying and working leather; it enacts,

Section 6. "That no person using the mystery of
"tanning of leather by himself, or by any other
"person or persons, shall during the time that he
"shall use the said mystery, occupy or use the craft
"or mystery of a shoemaker, currier, butcher, or
"any other artificer using or exercising cutting
"or working of leather; upon pain to forfeit and
"lose all and every such hide and hides, skin or
"skins, so by them or any of them wrought or
"tanned during the time that he shall use the
"mystery or craft of tanning aforesaid, or the just
"value thereof."

Section 25. "No person occupying the feat or
"mystery of a currier, shall use or exercise the feat
"or mystery of a tanner, cordwainer, shoemaker,
"butcher, or other artificer, using cutting of
"leather, during the time that he shall so use or
"occupy the mystery of a currier; upon pain of
"forfeiture of six shillings and eight pence for
"every hide or skin that he shall curry during the
"time that he shall occupy or use any of the
"mysteries aforesaid, contrary to the meaning of
"this article."

9 *Anne, c. 11.* is made for the purpose of imposing a duty upon hides: section 10. reciting that the due execution of the statute 1 *J. 1.* will much

contribute to the ascertaining and collection of the duties thereby imposed, enacts, that all magistrates shall duly execute the provisions contained in it.

Section 21. enacts, that each hide for which the duty shall have been paid, shall be marked by the officers.

Section 22. provides that the officer shall put the mark upon such part of the hide as the tanner shall think proper.

24 *Geo. III. c. 19. s. 2.* reciting the two former statutes, and that there was a doubt whether the 1 *J. 1.* was, by the 9th *Anne*, extended to *Scotland*,
“ by means whereof the duties upon leather in that
“ part of the united kingdom are greatly lessened
“ and impaired, by reason of persons who use the
“ art or mystery, at the same time exercising the
“ craft or mystery of shoemakers, curriers, or other
“ cutters of leather, contrary to the true intent and
“ meaning of the said act of King *J. the first*; there-
“ fore, &c. it is declared and enacted that the said
“ provisions shall extend to every part of the united
“ kingdom, and that no person or persons, &c.”

It was proved at the trial that the defendant was a tanner, and had sold tanned leather cut into small pieces, as each customer had occasion for it; that there is a distinct and separate trade of a leather cutter, whose only business is to buy whole hides and sell them by retail, cut into small pieces, as they are wanted; that curriers generally carry on the trade of leather cutters jointly with that of

curriers; that the custom in the country where the trial was had, has been for tanners to sell their leather cut in pieces when wanted. On this case the Judge at *Nisi Prius* directed a verdict for the crown.

On a former day *Rous* and *Dauncey* had obtained a rule to shew cause why this verdict should not be set aside, and a new trial granted on the ground of misdirection: and cause was this day shewn by

The *Attorney General*, *Newnham* and *Loycester*.—
The intent of the legislature in reinforcing the 1 J. I. for the purpose of revenue in the two subsequent statutes is very clear; the 9th *Anne* c. 11. imposing the duty and ordering the hides to be stamped, found it necessary, in order to prevent the tanner from defrauding the revenue, to provide that he should not trade in leather cut into pieces; for as each hide is to be marked on any part the tanner pleases, if he is at liberty to cut off any small piece he chuses for sale, the officer entering his tan-yard can never know whether the remaining pieces of leather belong to hides which were ever stamped or not; whereas, if he can have no pretence for ever having in his custody a piece unstamped, the revenue is secured.

The trade of a currier is forbidden because that operation obliterates the mark; and that of a shoemaker because it requires the hide to be cut into pieces; that reason applies more strongly to the present case; and no other reason can possibly be

suggested for introducing that clause to protect the revenue.

It is also within the letter of the statute, for it is proved at the trial that cutting of leather without any melioration of it is a trade, and therefore within the words of the statute, "*the craft or mystery of an artificer using the cutting of leather :*" and though that trade is now often joined with that of a currier, yet that is expressly contrary to the 1 J. I. c. 22. s. 25. which not only recognizes them as separate trades, but directs they shall always be kept so; although that part of the statute is now not enforced, because not of any moment to the revenue.

Rous and *Dauncey* on the other side, were stopped by the Court.

EYRE, Chief Baron.—The question is, whether the defendant has used the mystery of an *artificer* using the cutting of leather. A leather cutter, as he is described by the evidence, is not an artificer, but only a retail dealer in leather; but the statute means some distinct trade of an artificer, as a shoemaker or sadler, in the exercise of which the cutting of leather is used: but here the defendant carries on no separate trade from that of a tanner; he only sells his own article as a tanner, in small pieces.

The 24 Geo. III. relates to and must be construed by the 1 J. I.; in that act the 6th section enacts with regard to tanners, what the 25th section directs as to curriers, and in the same words; but

these words have been construed in the latter clause not to prevent selling leather in small pieces, and the constant practice has been accordingly ; we therefore must construe the same words in the former clause to have the same meaning.

HOTHAM, Baron, of the same opinion.

THOMSON, Baron.—In the case of *Lodge v. Hollowell*, Cro. Car. 587, it is determined, not only that a carrier may sell leather cut into pieces, but that he cannot sell it in whole hides ; and as the same words are used in the two clauses, we cannot give them different meanings. The word *artificer* in the act, implies some other distinct trade in which it is necessary to cut leather ; and the information is objectionable in not setting out *what kind of artificer*.

Rule absolute.

IN this term several promotions and alterations took place on the Bench and at the Bar.

The Lords Commissioners this day resigned the Great Seal, which was immediately delivered by his Majesty to ALEXANDER Lord LOUGHBOROUGH, Lord Chief Justice of the Court of Common Pleas as Lord Chancellor. 28th January.

14th February.

The Right Honourable Sir *James Egre* Knt. Lord Chief Baron of the Exchequer, took his seat as Lord Chief Justice of the Common Pleas.

The Right Honourable Sir *Archibald Macdonald* Knt. his Majesty's Attorney General, took his seat as Lord Chief Baron of the Court of Exchequer.

On the next day Sir *John Scott* Knight, his Majesty's Solicitor General was appointed Attorney General.

John Mitford Esq. was appointed Solicitor General, and knighted.

Mr. Serjeant *Rooke* was made King's Serjeant.

Robert Graham Esq. *Sylvester Douglas* Esq. *Thomas Plumer* Esq. and *William Garrow* Esq. were made King's Counsel ; and patents of precedence were granted to *William Grant* Esq. and *John Anstruther* Esq. the former to take rank next after Mr. *Graham*, the latter after Mr. *Plumer*.

Robert Graham Esq. was appointed Attorney General, and *John Anstruther* Esq. Solicitor General to the *Prince of Wales*.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

EASTER TERM,

33 GEORGE III.

CLARKE v. JENNINGS.

*Tuesday,
23d April,
1793.*

RICHARDS moved, after publication, for leave to exhibit interrogatories to authenticate an old paper writing, material in the cause, and for a commission to prove the same. He stated the proof of its authenticity to be from its being found in the registry of the parish church, and from the similarity of the hand-writing to other papers written by the registry of the same date. The Court allowed the defendant, after publication, to prove an old paper found in the parish registry.

Grimwood opposed the motion, as being too late. That only exhibits can be proved after publication, and this paper depending entirely upon parol evidence, is within the sense of the rule to prevent perjury.

The *Court* thought, that though not an exhibit, it was in the nature of one, and granted the rule, so as not to delay the hearing of the cause. And, by THOMSON, Baron, we must be understood to give no opinion on the admissibility of this paper, upon such evidence as has been suggested.

Friday,
3d May.

ROGERS v. ROGERS, Administratrix.

MOTION by *Stratford*, to restrain the defendant from disposing of the personal property of the intestate, (her late husband,) which consisted in Bank Annuities, on the ground, that all the debts were paid, and the estate in danger while in her hands; and as the bill was also for an account of the rents of the real estate of the plaintiffs, (the children,) of which the defendant was trustee during their minority, and admitted herself to have kept no regular account, and was charged with fraud, the plaintiffs prayed that the *whole* Bank Annuities might be transferred into the name of the Deputy Remembrancer, or the defendant restrained from conveying it, and the Bank from making a transfer, as a security for the balance.

But the *Court* thought, that as the defendant was clearly entitled to a third of the personalty, until she should be found in arrear as to the realty, which depended on the taking of the account,

they could not keep her out of possession of that part of the personalty, and accordingly granted the rule only as to two-thirds of the Bank Annuities.

Mr. *Baron Perryn* was unable to attend the Court during the remainder of this term.

VINER v. CLARKE.

Saturday,
4th May.

IN this cause, the writ of inquiry was executed, upon notice less by one day than the regular notice. Upon this ground *Marriott* moved to set it aside. *Short* contended, that the defect was cured by the acquiescence of the defendant, the rule being, that the party cannot take advantage of such an irregularity after he has looked on and allowed it to be completed; but must, previously to its being completed, give notice of his intention to take advantage of it.

Irregular notice of executing a writ of inquiry is cured by the defendant's lying by, and allowing the writ of inquiry to be completed.

To this the Court agreed; but the rule was made absolute upon other grounds.

Same day.

FRENCH v. CASENOVE.

A writ of error is allowed two days after the return of the *Ca. Sa.* The bail may be sued, pending the writ of error, which is no *supersedeas*.

S*SHEPHERD* obtained a rule to shew cause why the proceedings against the defendant should not be set aside. Cause was this day shewn by *Marriott*.

It was an action against bail. In the original action, before execution sued out, a writ of error was brought in the Exchequer Chamber; upon affirmance by default, the plaintiff sued out a *Capias ad Satisfaciendum*, returnable on the 25th of *June*. On the 26th of *June* the defendant got a writ of error in parliament sealed, and on the next day, the 27th, it was allowed. The defendant was surrendered by his bail in the month of *November* following after action brought. In *January* the writ of error in parliament was nonprossed.

Marriott argued, that the bail were fixed. The time when bail are fixed, in strictness of law, still continues to be the return of the *Capias ad Satisfaciendum*; and in case of the death of the defendant, that is still the rule in practice. The Courts now indulge the bail in all other cases till after the return of the process against them; but this being merely an indulgence of the Courts, the right is vested, and cannot be affected by any subsequent transactions in the original cause. While a writ of error is depending, the Court will generally stay proceeding against bail, 1 Burr. 340. *Christie v. Richardson*, 3 Term Rep. 78-9; but it never was attempted to set them aside. So if debt is brought

on a judgment pending a writ of error, the Court will in general stay proceedings; but the writ of error is no legal *supersedeas*; and therefore where it is merely for delay, the Court will not interfere. *Entwisle v. Shepherd*, 2 Term Rep. 79. A writ of error supersedes all proceedings in the original action, but not where the proceedings are upon a different original, *Rogers v. Mayhoe*, Carth. 1. *Adamson v. Tomlinson*, 1 Siderf. 236; and this applies to a suit against bail as well as any other *Anon.* 2 Show. 85. *Lock v. Tillierd*, 2 Roll. Abr. 491. 5 Bac. Abr. 679. The case of *Smith v. Nicholson*, 1 Wils. 16, and the case there cited confirm this rule.

Shepherd and Dauncey, for the defendant.--By the present practice of this Court, the bail have eight days, after the return of process in an action against them, to surrender their principal: if within that time a writ of error is brought, and the bail are afterwards sued, the practice is to stay proceedings, on the bail undertaking to pay the debt or surrender their principal within a certain time after affirmance in error: this practice proves decisively that the bail are not then fixed. If we had moved to stay proceedings before the eight days were expired, we must have had it; and the same reason, the dependence of the writ, of error, applies to avoid all proceedings now, which the Court would have staid as improper, upon application at the time. The writ of error stops all proceedings; and they are to be considered in the same situation at the time when the error was nonprossed, as when it was allowed.

THOMSON, Baron.—If the proceedings are suspended, what need is there of a motion to stay them?

Shepherd.—In every case where proceedings are irregular, the proper practice is to move to stay them; lest both parties be put to greater expence by the continuance of the suit.

On a subsequent day (the 14th of *June*) the Court declared their opinion against the rule, which was accordingly discharged.

In the House
of Lords.
Same day.

THE KING v. AMERY.

On a judgment for the relator in an information in the nature of a *quo warranto*, he is entitled to costs. **T**HIS was an information in the nature of a *quo warranto*. Judgment was given for the defendant in the Court of King's Bench in Trinity Term 1788. (See 2 Term Rep. 569.) That judgment was reversed upon a writ of error in last session of parliament; nothing was then said by the House as to costs; and accordingly the judgment was entered without mention of costs. The relator objected to the judgment as entered, but did not apply to the House upon the subject during that session. In this session he presented a petition, that an order might be made by the House, that the Court of King's Bench should tax the petitioner his costs of the prosecution, and that when the costs should be taxed by the proper officer and cer-

A Court of Error ought to give the same judgment upon reversal, which the Court below ought to have given.

If a judgment is entered without costs in the King's Bench, where costs ought to have been given, it can only be amended in the

tified to the House, the judgment might be recorded with the addition of costs.

same term. So in the House of Lords, no amendment can be in such a case after the session.

This was opposed upon the grounds,

First, that the giving costs in informations in the nature of *quo warranto* is discretionary in the Courts, and therefore the judgment is right.

Secondly, that the petition is too late.

Adair, Serjeant, for the petitioner.—As to the present point, the words in the 5th section of the act, (9 *Anne*, c. 20.) “it shall and may be lawful for the Court to give judgment that the relator do recover his costs,” have always been held imperative, and accordingly it has always been the practice to give costs on suits of this kind. *Rex v. Howell*, Ca. Temp. Hard. 247.—*Rex v. Downes*, 1 Term Rep. 453.—The *King v. Hertford*, Carth. 503. and 1 Salk. 376. 1 Ld. Raym. 426. the rule is laid down very expressly that costs must be given in all such cases. 3 Bac. Abr. 171.—Hawk. P. C. 263. So whenever the one party is entitled to costs, it is reciprocal. *Greetham Widow v. The Hundred of Theale*, 3 Burr. 1723.

Lord KENYON.—In penal actions, and in actions by executors, there is no reciprocity.

Adair, Serjeant.—Those are exceptions from the general rule upon particular grounds.

Where costs ought to have been given below, the Court of Error is bound to give the same judg-

ment. Where there is any thing more to do than merely to reverse or to affirm, this Court always goes on to give those directions which are the necessary consequence of their decision. *Parker v. Harris*, 1 Salk. 262.—So in *Philips v. Bury*, 1694-5, in the Journals of the House of Lords, vol. 15, p. 473, judgment was reversed: afterwards, p. 482, it was ordered that it should be added to the judgment, that the plaintiff recover his term with *costs* and damages. The judgment indeed states a release of the costs and damages. So *Ashby v. White*, 1 Bro. P. C. 45.—*Lyde v. Rodd*, 1 Bro. P. C. 328.—*Wyvil v. Stapleton*, and *Shelburn v. Eudem*, 1 Stra. 617. So in a case from Ireland, *Hogan on dem. Wallis v. Jackson*, in ejectment, there was judgment in King's Bench in Ireland for the defendant; on error in King's Bench in England, it was reversed in Trinity Term 1774; and the judgment was that the plaintiff recover his term and *costs*.—Upon this judgment the Master of the King's Bench wrote to the Prothonotary in Ireland desiring him to tax the costs; the sum certified by the Prothonotary was inserted in the judgment here; the reversal was affirmed in the House of Lords, 7 Bro. P. C. 467.—So *Moore v. Shallcross*, 23 Feb. 1677. 13 Lords Journ. 159—170.

The objection of our being too late, must rest on the prorogation of parliament having intervened; but it appears that the Court of Parliament has perpetuity, like any other Court, for these purposes. 2 Reeves's History of the Law, 216. and the passage from Fleta there quoted; and it is so expressly found upon a reference to a committee 11th March

1673. 12 Lords Journ. 352. and on the 19th *March* 1679. 13 Journ. 466. that is extended to impeachments: although as to the latter a doubt may arise from the reversal of the judgment against the Earl of *Danby* and others, 22 *May* 1685. 14 Journ. 11.

In *Ashby v. White* the entry is, “ upon petition “ of *W. W.* the plaintiff in a writ of error *lately* “ depending,” &c. “ that by some mistake of the “ petitioner’s attorney,” &c. and thereupon the mistake is rectified.

In *Dean v. Symonds*, 13 Journ. 158, 220, 221, 269, judgment of King’s Bench was affirmed, and costs ordered to be taxed by the Court below; in next session, 1678, on petition stating that the Court of King’s Bench could not tax the costs, it was ordered that the plaintiff in error pay the petitioner 20*l.* for his costs.

In *Craddock v. Radford*, 4 Mod. 371, an error in a judgment of 20 years standing, reversed by *Sci. fa.* was amended by rectifying a mistake in the name of the plaintiff: and a case is there mentioned of a misprision in the point of the judgment itself having been amended: and in *Philips v. Smith*, 1 Str. 136. and *Sir Humphrey Tufton*, and *Sir John Ashley’s* case, Cro. Car. 144. it is established, that an error by misprision of the clerk may be amended in a subsequent term as well as in the same.

Here the Court deliver the important part of the judgment.—The adding costs is merely ministerial, a necessary consequence of the other; the

clerk has mistaken his duty ; the House is to see that his error does no injury to the party.

Bower on the other side.—The statute does not intend that the relator shall, in all cases, be entitled to his costs. Where judgment is given for the defendant, the words are imperative, “ he shall recover his costs ;” but if the judgment is for the relator, “ it shall and may be lawful for the Court to give judgment that the relator shall recover his costs ;” this distinction in the expressions evidently means to give a discretion to the Court in the latter case. The cases cited shew that wherever the plaintiff is entitled to costs, so the defendant shall be on judgment for him, but not the converse. In 18 *Eliz. c. 9. s. 3.* costs are given against common informers upon delay ; but they never can recover costs.

It does not follow that the Court of Parliament is bound by the same rules as to costs, with other Courts ; they may exercise their discretion upon the circumstances of the case.

The cases cited of amendments of judgments in error, have all been where the judgment without the amendment would have been nugatory or contradictory ; there is no instance of a judgment complete in itself, having been altered at a subsequent period.

Here there is nothing to amend by : below, amendments are made by the order pronounced ;

but here no order has been pronounced upon this subject.

Adair, Serjeant, in reply.—The words of the statute which direct judgment of *ouster* against the defendant, are the same which direct costs against him ; “ it shall and may be lawful for the Court,” &c.; this is clearly imperative in the one case; it must be so in the other.

The HOUSE proposed three questions for the opinion of the Judges, to each of which, EYRE, Chief Justice, this day delivered their unanimous answer.

First, Whether the Court of King’s Bench, in giving judgment for the relator in an information in the nature of a *quo warranto*, under the statute of the 9th *Anne*, c. 20. is bound to give judgment that the relator shall recover his costs of such prosecution ?

Answered in the affirmative.

Second, Whether, upon a writ of error, if the judgment of the Court below be reversed, the Court of Error must give the same judgment as the Court below was bound to have given?

Answered in the affirmative.

Third, Whether, if the judgment had been entered in the Court of King’s Bench below, in the manner in which it is entered in this case, it could have been altered in a subsequent term?

Answered in the negative.

Afterwards, *June 14*, in the House of Lords, upon a motion to insert at the end of the judgment these words, (" and that the Court of King's Bench do tax the relator his costs of this suit, " as if that Court had given judgment," &c.) the same was, upon the question put, refused.

*Tuesday,
7th May.*

HARDCASTLE v. SHAFTO.

Where the principal subject in dispute is the locality of the lands of each, which have been confused while occupied by one person, an ejectment does not decide any thing; and therefore a Court of Equity will not allow the lessor of the plaintiff to take out his execution, so as to choose his own part of the lands.

Where lands are confused, and the plaintiff at law recovers on an instrument which states the whole to be 25 acres, of which 18 belonged to him, and in fact it appears that the whole land is

BILL for injunction against proceeding at law, on the following grounds: that the plaintiffs were lessees of the premises in question under the late Lord *Feversham*, under a building lease, in confidence of which they laid out money in improvements. In 1763, Lord *Feversham* died; the defendants acquiesced in the lease, received the rents, and saw expensive improvements making under it, and, as the bill charged, though not admitted by the answer, encouraged those improvements, till 1775, when the first ejectment was brought for the greater part, being all the freehold, of which Lord *Feversham* was only tenant for life; the freehold and copyholds lands were so mixt and confused as not to be distinguishable, nor the quantity of each known. The Court had dissolved the injunction, as to the trial of the ejectment, but continued it as to execution, *till further order*. A verdict was found for the plaintiff at law, upon an instrument, which stated the whole piece of land to contain twenty-five acres, of which eighteen were freehold, the other

seven copyhold. It was sworn, however, that in fact, the piece of land contained only twenty-one acres and a half; viz. three acres and a half short of the measurement in the instrument.

only 21 acres; he shall not be allowed to take out execution for 18, but must abate proportionably.

Plumer moved to dissolve the injunction, on the ground that the ejectment had settled the matters in dispute.

Where a tenant, under a void lease, makes great improvements, with the knowledge and approbation of the landlord, he is entitled in equity to a valid lease. *Semb.*

Burton and Richards on the other side.

M'DONALD, Chief Baron.—The question is, Whether, upon the whole case, it will more tend to the purposes of justice to change the situation of the parties, or to delay the plaintiff till the whole is fully heard? This is not the common case where a trial at law is had to satisfy the conscience of the Court; this ejectment is incapable of satisfying the conscience of the Court upon many material points which it will be necessary to ascertain.

In the first place, the trial in ejectment cannot satisfy the conscience of the Court as to the locality of the freehold premises to be recovered: for it does not ascertain by metes and bounds; and as the freehold and copyhold are mixt, and some parts more highly improved than others, we cannot allow the defendant to take out execution upon whatever part he shall choose.

Secondly, as to the mensuration varying from the instrument, that may be a proper ground for the Court to decree a proportional abatement in the share of each, and is at least a sufficient reason for

restraining the defendant from taking immediate possession of the whole eighteen acres.

4 Atk. 83.
3 Atk. 692.

Thirdly, the conduct of the defendant in permitting and encouraging the improvements, under sanction of a lease which he knew to be bad, may perhaps in equity give the plaintiff a claim against him for a new lease, though it does not at law, amount to a confirmation or renewal of the old; as to this therefore the verdict is not conclusive.

We are, for these reasons, of opinion that the injunction ought to be continued till the hearing; the plaintiff to proceed without delay.

HOTHAM and THOMSON, Barons, concurring, it was ordered accordingly.

Same day.

PISTON v. DUNBAR.

Several bills were delivered in, settled, and paid, in the course of a long cause, and a receipt in full given; at the end of the cause the client moved to refer them all for taxation. The order was discharged.

AN order having been obtained by the defendant (as of course) to refer for taxation the bills of his former solicitor *Hearne* (he having since employed another in the cause);

Plumer and *Scafe* now moved to discharge that order, upon an affidavit which stated, that *Hearne* and his then partner delivered in two bills in 1788 to the defendant and his then co-defendant, since deceased, both of which bills were then paid; in 1790

all accounts were settled, and a receipt in full given: afterwards the cause was carried on by *Hearne* alone for the surviving defendant, and another bill was lately delivered, which the defendant refused to pay till the whole should be taxed; *Hearne* refusing to have the former bills taxed, as being between other parties, the defendant at last paid the bill, and all papers in the cause were then delivered up. The defendant afterwards obtained this order, as of course, which was argued to be irregular, as the long acquiescence had completely closed the former account, and Mr. *Hearne* submitted to taxation of the last bill.

King, on the other side.—If in the first year of a cause, the attorney can have his bill paid and finally settled, the client loses his safeguard of a taxation upon the whole bill in the cause. This is not like the case where the business is concluded, and the bill then paid and acquiesced in; nothing is in fact due till the end of the cause; and all prior payments should be taken as payments on account, however expressed. The most solemn security cannot prevent taxation, if within a proper time after the bill is settled; so jealous are the courts, that the influence of the attorney over his client shall not preclude future investigation. As to the change of parties they stand in the place of the original parties; and so no difference can arise on that ground.

M'DONALD, Chief Baron.—It would be a dreadful hardship upon a solicitor if he had no means of

settling the account of his fees and disbursements in the first years of a long cause, but was always liable to have his bills, though long ago settled, referred for taxation.—When paid, it becomes part of his capital; he reckons upon it in the balance of his affairs; and the adjustment of the partnership concerns goes upon the foot of it: besides, the delivery of a bill is a challenge to the client to dispute the reasonableness of it, and his acquiescence admits it to be fair; and it is much better for the client that bill should be delivered and settled, from time to time, during the cause, that he may know what expence he is incurring, and whether he has reason to be satisfied with his solicitor.

The other Barons concurring, the order was discharged.

Friday,
10th May.

LINGHAM v. TOULE.

After an injunction dissolved on the merits, the plaintiff on an amended bill cannot have another injunction without a special affidavit of merits, though the defendant be in contempt for not answering.

ANSTRUTHER moved, upon notice, for an injunction, the defendant being in contempt for not answering the amended bill.

King, for the defendant, contended that the injunction having been dissolved on the merits of the answer to the original bill, could not be renewed as of course, for otherwise the plaintiff might, by repeated amendments, continue the injunction for

ever; and cited 3 Atk. 694. *Travers v. Lord Stafford*, 2 Vez. 19. and Ambl. 104.

Anstruther took the distinction, that in those cases the defendant was not in contempt as here. It is there also said, that upon the coming in of the answer, the plaintiff may apply for an injunction on the merits confessed in it; and he cannot be deprived of that benefit by the defendant's contempt in not answering.

Richards, amicus curiæ, mentioned the case of *Edwards v. Jenkins*, before Lord *Thurlow*, *Lincoln's Inn Hall*, 19th January 1792. There the injunction was dissolved upon the coming in of the answer to the original bill; the bill being amended, and the defendant having prayed time to answer, an injunction was moved for upon notice, and a general affidavit of the truth of the bill. Lord *Thurlow* held this sufficient, without any particular affidavit of the truth of the new matter, or any reason assigned for its not being included in the original bill. He said, that if the amendments were such as would, if true or admitted, entitle the plaintiff to an injunction, he must be equally entitled to it in that motion; and considered the practice of moving it specially at all, as being rather necessary from the cases upon the subject, than from the reason of the thing.

THOMSON, Baron.—I take it not to be at all a motion of course, to have an injunction on an amended bill, after the former injunction has been dissolved. Your bill is not taken for true till it is

admitted or proved ; an affidavit of the truth of it will be necessary, as where the injunction is to stay *waste*, where the plaintiff cannot wait till the answer comes in.

M'DONALD, Chief Baron.—The former injunction having been dissolved upon the merits, it is impossible that this motion can be granted as of course ; it must be verified by affidavits at least.

*Saturday,
11th May.*

THE KING v. SHERIFF.

The debtor of the crown took out an extent against his debtor for a large sum, a small part of which was disputable on his own shewing ; the extent is not void in toto.

The claim of an indorsee against the drawer of a bill of exchange, on non-payment by the acceptor, is an original debt on which the debtor of the crown may sue out an extent.

THIS was the case of an extent taken out by the original debtor of the crown, against the defendant his debtor, for 1200*l*. The debt was upon several bills drawn by the defendant upon different persons, some of which were accepted, and payment when due refused by the acceptors before the extent ; the others were not accepted, and the greater part or all of these had by their tenor some time to run at the time the extent issued : the bills came into the hands of the accountant by his discounting them, part for the defendant, part for other persons the indorsees. The sheriff levied only 700*l*. upon the extent.

Rous now moved to set aside the whole extent, as having issued improperly. He admitted, that since

the decision of the case of the *King v. Blatchford* last term, it was impossible to argue that the circumstance of this being a mere transaction in trade between two individuals, without any reference to the crown's debt, could make any difference; but this extent has issued partly upon bills which were not then due; and as the rule of 1786 has provided that no such extent shall issue upon *bonds* but where they are due, *a fortiori* it cannot issue on an inferior species of security till due. Here too the accountant is not the original creditor, but only has purchased the right to the bills by discounting them, and indorsement to him: but whether the claim is transferred into his name by legal or equitable assignment can make no difference, *Rex v. Bowling*, Bunb. 926; and is contrary to the rules 15 Car. 1; and it breaks that rule in this also, that the acceptor and not the drawer is the original debtor.

The *Attorney General, Plumer*, and *Knapp*, contra.—There are some of the bills which were due at the time of the extent, *viz.* all those accepted and not paid; but if any are due, it is a sufficient answer to this motion, which goes to set aside the extent *in toto*. Even as to the others which were not due, their being refused acceptance, makes the demand against the drawer take place immediately. *Milford v. Mayor*, Doug. 55. The holder has a right to consider the contract as broken and dissolved, and therefore, upon returning or allowing the discount, the extent may well be executed as to the principal sum. The rule 15 C. 1. and which is followed in the case in *Bunbury*, was made in order to prevent the buying up debts, and getting

prerogative process for their recovery; but here the legal negotiability of the instrument drawn by the defendant, takes it out of that rule, which was only made in affirmance of the common law to prevent maintenance; and the defendant, as drawer, may be considered as the original debtor. Only 700*l.* being levied upon the extent, which issued for 1200*l.* no objection can support this motion while debts to the amount of the sum levied remain good.

Rous, in reply—My objection is, that this extent is not warranted by the affidavit, and has therefore issued improvidently. By the facts stated in the affidavit, it appears that less than the sum of 1200*l.* was due; for it is admitted, that the discount at least should have been returned. It would be very dangerous to allow the party to take out an extent for more than by his affidavit appears due. *This* extent ought never to have issued, and therefore should be set aside.

M'DONALD, Chief Baron.—If the debts cover the sum raised, we cannot allow a doubt raised as to part of the claim to set aside the whole extent, for then very few extents or none could stand. Here there appears to be by far the greater part of the claim really due, and that is sufficient to save it from being set aside *in toto*.

The other Barons concurring, the rule was discharged.

The KING v. MARSH, Executor of Cuthbert.

Monday,
13th May.

THE *Scire facias* stated, that *G. Smith, Arthur Cuthbert, Gavin Young, and Gavin Glennie*, by their recognizance 27th October, '28 G. III. became bound to the crown jointly and severally in 4000*l.*; and thereupon this *Scire facias* issued against the estate of *Arthur Cuthbert*. The defendants pray oyer of the recognizance and of the condition, which, reciting that by certain articles of agreement bearing even date therewith, and made between *A. B. C. and D.* the commissioners for managing the duties on vellum, for and on behalf of his majesty, of the one part, and the above-bounden *G. Smith* of the other part, the commissioners had let to farm to *Smith* for three years, the post-horse duty for *Scotland*, at and subject to a certain rent, in the said articles particularly reserved, and under certain covenants, clauses, and restrictions, therein also contained, was conditioned for the payment of the rent and performance of these covenants by the said *Smith*, and his observance of the directions of the statute regulating the collections of the duty.

Sci. fa. on recognizance which appeared, upon oyer, to be conditioned for the due performance of articles entered into by *A. B.* Plea that the defendants never had a counter-part of the articles; that *A. B.* performed all the affirmative covenants; that there was only one negative covenant, (stating it,) which had also been complied with. The plea held bad.

Plea. The defendants say, that *the only negative covenant*, grant, article, condition, or agreement, comprized in the said articles in the said condition mentioned, on the part and behalf of the said *G. Smith* in the said condition named, is a certain covenant or agreement (stating the covenant;) *but that they the said defendants have not nor ever had, neither had the said Arthur Cuthbert in his lifetime,*

any counterpart of the articles in the said condition mentioned, in their or either of their custody or power; and the defendants say, that the said G. Smith did not, &c. (averring observance of the negative covenant,) and they further say, that the said G. Smith did well and truly pay or cause to be paid, &c. the rent aforesaid, &c. and did in all things perform the said covenants, &c. and did in all things perform and observe the directions of the said act, &c.

To this plea there was a special demurrer for not *setting forth* the articles, and not denying possession of *the articles*, and for the negative pregnant in only denying possession of any counterpart. Joinder in demurrer.

Lowndes, for the crown.—The defendant who pleads performance of the conditions of an indenture in discharge of his recognizance, is bound to set forth the indenture, *Cook v. Remington*, Salk. 493, and S. C. 6 Mo 237; and so agreed by the Court, 1 Sid. 50; and if he demands oyer of it from the plaintiff, it is bad on special demurrer, though good on a general demurrer by the statute. *Jevens v. Harridge*, Saund. 8. So *anon.* 1 Mod. 266. *Sayre v. Minns*, Cowp. 575. And the plaintiff may, before replication, demand oyer from him, *Hibbs v. Clough*, Str. 227. *Soresby v. Sparrow*, Str. 1186. and Wils. 16. If it is in the hands of the other party, the Court will compel him to bring it in. 1 Mod. 266. Saund. 9. 1 Sid. 50. Cro. Jac. 429. The cases where a profert has been dispensed with, are, upon sufficient excuse being offered to the Court; as where it

is pleaded, that the other party *penes se habet*. *Carver v. Pinkney*, 3 Lev. 82. Or a third person, *White v. Earl of Montgomery*, Str. 1198. Or that it is destroyed by fire; or by time or accident. *Read v. Brookman*, 3 Term Rep. 151. But here the defendant neither shews the deed destroyed, nor where it exists. He does not even deny his possession of the deed itself, but only of the counter-part, which is materially different. *Yelverton v. Cornwallis*, Noy 53. But even where oyer can be dispensed with, it is necessary to set out the deed *in hæc verba*, because the defendant must shew performance; and if there are any negative or disjunctive covenants, must plead performance specially. Co. Lit. 303. Cro. Eliz. 233. And the averment, that there is only one negative covenant, will not help; for that is averring as a fact to be traversed, a mere matter of law. The jury cannot judge of the covenants, whether they be good or bad, negative or affirmative; but that should appear to the Court on the record. If this manner of pleading were allowed, each party would only set out what he chose of the deed, and the other party be put to set out the remainder, which would cause great prolixity in the pleadings: and accordingly no case has been determined in which the averment of the contents of a deed has been allowed.

Marryatt, on the other side.—Where there is a recognizance to perform covenants, the general rule certainly now is, that the party who is to defend himself by performance must shew the deed; but this rule does not hold, where upon the condition of the recognizance he appears not to be a party to the

indenture, and is therefore not to be supposed to have it in his possession. It was formerly unsettled which party should produce the deed. *Fitz. Abr. Monstrans des Faits*, *pl.* 580. *Mich.* 16 *H. VII.* 12. *b.* *Hil.* 7 *H. VII.* E. 30 *H. VII.* 1; which are contradicted by *Al.* 72. But in all these cases the defendant was a party to the deed as well as the bond. So in the case in *Salk.* the reason given for making the defendant shew the indenture is, that he is a party to it. And so the same case is also reported in 6 *Mod.* In *Keilway* 71, the distinction is expressly taken, that a stranger may plead performance without shewing the deed. So in *Dr. Leyfield's* case, 10 *Co.* 93 *b.* 94 *a.* and in *Dy.* 277. *pl.* 58. by which and the marginal notes it appears that this is the case, even where the estate cannot pass without deed, and the deed is in the hands of one who holds to the use of the party pleading. So *Reynell v. Long*, *Carth.* 315. *Bul. Ni. Pri.* 251, 252. *Crotch v. Crotch*, *Lutw.* 145. Where the plaintiff is in possession of the deed, the Court indeed may, and generally does, compel him to produce it to the defendant; but this is only *ex gratia*; the Court may refuse it, and therefore there can be no rule of pleading founded on it; and if the defendant can defend himself without trusting to this favour, he may. The cases have gone very far to shew, that where the party pleading avers that he is not in possession of the deed, without his own default, he is excused; as where it is in the custody of another Court, of the party, or of a stranger, destroyed by fire, or lost or destroyed by time or accident. The material fact in all these cases is, that it is impossible for him to produce it; whether it exists at all or

not seems perfectly immaterial. Here the defendant denies ever having had it, which is a sufficient excuse for not producing it, he being a stranger. Whether it exists in the possession of any one is immaterial, and not within his knowledge, and which therefore he is not bound to aver. As to possession of a counterpart only being denied, the presumption of law is, that the original is in the hands of the plaintiff; if the defendant had had any, it must have been a counterpart: and as where there are two parts, each is the principal, each must also be the counterpart; so that it amounts to denial of possession of either part.

Lowndes, in reply, contended that all the authorities only meant to excuse the defendant, on proper grounds, from the profert, but not from setting forth the deed *in hæc verba*. The expressions in *Leyfield's* case must be understood so, for the case itself is expressly on the want of a profert, and not on the manner of setting forth the contents: so *Crotch v. Crotch*, in *Lutw.* goes on the profert; and the case in *Keilway* is explained by *Duport v. Wildgoose*, 2 *Bulst.* 259, 260. to have been on the same point; so the case of *Raynal v. Long*, in *Cartew*, and all the modern cases have only been, that the party has been excused from the profert, but not from setting forth the deed, so that the Court may judge of the effect of the covenants.

The Counsel for the defendant expressing an anxiety to have an immediate decision on the validity of the plea, on this day

The *Court* said, that they had not had time to look into the cases : but as they had no doubt of the badness of the plea, they should give judgment for the crown.

Same day.

MURPHY v. CUNNINGHAM, Gent.

An attorney cannot set-off his bill without having delivered it.

IN this action the defendant gave notice of set-off of his bill as an attorney ; but as he had not delivered his bill, the Lord Chief Baron refused to admit the set-off, as not being a debt recoverable in an action till a month after delivery of the bill. A rule *nisi* for a new trial having been obtained by *Dauncey*,

Jekyll now shewed cause ; and relied on the cases of *Williams v. Frith*, Doug. 198. and *Hooper v. Till*, *ibid.* and the cases of *Dixon v. Plant*, and *ex parte Bearcroft*, there cited, to shew that the Court never permit the items of an attorney's bill to be investigated at *Ni. Pri.* but insist on their being delivered for the purpose of being taxed by the officer ; and in *Martin v. Winder*, *ibid.* the Court held delivery a month before not to be necessary, yet that it must be delivered in such time that the plaintiff may have it taxed before the trial : here it was not delivered at all.

Dauncey, contra.—Before the statute 2 *Geo.* II. attornies had the same remedy for their bills as other persons: that statute restraining them from their common law right is to be taken strictly; accordingly it has been held not to extend to the executors of attornies, nor to business done at quarter sessions, or in conveyancing. *B. N. P.* 145. 4 Term R. 124. *n.* The statute does not include the case of set-off, and it cannot be extended by inference. The case of *Martin v. Winder* establishes that it is not within the statute; for there a *month's* notice was dispensed with; it is there added, indeed, that there must be some notice, so as that the other party may have it taxed, and not be taken by surprise at the trial; but the notice of set-off here expressing it to be for business as an attorney, prevents all surprise; the plaintiff might, by summons before a judge, have obtained a bill of particulars, and got the bill taxed. In *Martin v. Winder* it does not appear that the set-off expressed the demand to be for business as an attorney; but in a late case of *Briggs v. Montague*, Lord KENYON admitted proof of a set-off which did express the demand to be for business done as an attorney, although the bill was not delivered, because the plaintiff might have had it delivered if he had chosen, by summons before a judge.

M'DONALD, Chief Baron.—That case comes so near the present that it will be necessary to inquire into it. The practice of all the Courts must be kept uniform in this point. I know my Lord *Mansfield* had different opinions upon it at different times.

On this day the *Court* said, that upon inquiry, they found the case of *Briggs v. Montague* was for business in conveyancing, which therefore did not apply.

The rule was discharged.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER ;
IN
TRINITY TERM,
33 GEORGE III.

— v. —

1793.

SIMEON, in behalf of the plaintiff, moved for a commission to examine witnesses abroad : he stated the bill to be merely for discovery, for the purpose of supporting an action at law brought by the plaintiff here against the defendant ; and therefore considered the motion as of course, being only in his own delay.

By the *Court*.—If the bill had been for relief, you clearly must have moved this upon affidavit of materiality; for a plaintiff may often have a desire to delay his own suit. The same principle applies to this case.

Monday,
3d June.

CECIL v. PLAISTOW.

The creditors of the plaintiff, and among others the defendant, accepted a composition of payment by instalments; the defendant got a new bond for half his demand, and only took the composition for the other half; this was held bad, as a fraud on the other creditors, and on the wife of the plaintiff who had joined in the security on the composition.

THE original bill was for an injunction against proceeding at law, and for an account of all transactions between the parties, *H. Cecil* Esquire, nephew and heir of the Earl of *Exeter*, and General *Plaistow*. The case appeared upon the hearing, to be a long chain of successful frauds practised by the defendant upon the plaintiff, by which, without having any original claim upon the plaintiff, or having, as far as appeared, ever advanced him any money, he had contrived to get from him 3000*l.* and to have in his custody a bond from *Cecil* to him, conditioned for the payment of 6025*l.* The friends of Mr. *Cecil* at this time wishing to extricate him out of his difficulties, a composition was entered into with his creditors, by which it was agreed that the creditors should accept payment by twelve instalments, and Lord *Exeter* and Mrs. *Cecil*, the wife of the plaintiff, joined with him in conveyances to secure these payments. Mr. *Cecil* then requested General *Plaistow* to accept a bond for 3000*l.* in part of the other bond, and to give in that only under the composition, in order to induce other creditors to follow the example. Accordingly a bond for that sum, antedated, was executed to the defendant, and he signed the composition for that sum as being his whole debt. Soon afterwards he, by repeated solicitations, obtained from the plaintiff another bond and warrant of attorney to confess judgment for 3580*l.* (the residue of the money due on the bond for 6025*l.*)

The defendant received eleven instalments under the composition; but when the twelfth was refused to be paid to him without a receipt in full, he entered up judgment on this last bond. This bill therefore sought an injunction against taking out execution thereon; and as the defendant *Plaistow* had since died insolvent, that was the only remaining question in the cause.

HOTHAM, Baron, this day delivered the opinion of the Court; and after stating the case, and the numberless proofs of unfairness in every part of the defendant's conduct, his various schemes to overreach the plaintiff, and the impudent falsehoods and contradictions in his answer, proceeded to consider the effect of his signing the deed of composition upon the present claim.

We are of opinion that the defendant is precluded now from making this demand. It has often been determined, and is admitted by the counsel for the defendant, that where there is a composition to take a smaller sum than the whole debt, a creditor signing it cannot afterwards claim any other debt then due to him. This indeed is a composition not to take less than the whole debt, but only to receive the whole sum in a different manner and at different times; yet it is a composition by which the creditors agree to take the effect of their respective demands in a less beneficial manner than they were before entitled to; and to sign a false schedule in order to induce them to come into that measure, is to deceive and defraud them.

The circumstance of the original bond, which remained in his hands for securing the balance, having been exchanged for another, and the present claim being on a bond executed after that deed of composition, cannot help him: the *demand* existed before; and the mere device of changing the securities cannot do away the nature of the transaction.

It has been argued that the creditors could not be injured by this concealment; at all events they were entitled to be paid their demands *pari passu* with him, and this is an unfair attempt to gain a superior advantage over them by a fraudulent concealment of the truth.

Mrs. *Cecil* is a party materially interested; she joined in the securities on the faith that she was thereby clearing Mr. *Cecil* from all his difficulties; and it was held, in the case of *Middleton v. Lord Onslow*, that secret and under-hand dealings, by which the hopes of the wife were deceived and disappointed, were a sufficient ground to avoid the transactions. We are therefore of opinion that, whatever might have been the motive of this part of General *Plaistow's* conduct, his having signed the deed of composition *estops* him from afterwards claiming any other debt then due and concealed.

— v. —

Tuesday,
4th June.

NEWNHAM moved (upon notice) to remove this cause out of the Court of Common Pleas into the Office of Pleas of this Court, upon affidavit that the cause of action (which was for an assault and false imprisonment) arose wholly in execution of the defendant's duty as an officer of revenue; the defendant having seized the plaintiff's ship on suspicion of smuggling.

An action of trespass against a revenue officer, for his conduct in the execution of his office, may be removed from the Court of Common Pleas into the Office of Pleas of this Court.

Rous was to have opposed the motion; but . . .

M'DONALD, Chief Baron, said, there could be no doubt about it. The point was very fully discussed, by Lord Chief Baron EYRE, a few years ago, in delivering the opinion of this Court upon a similar motion*; he there shewed that this is a very old jurisdiction of the Court, and operates in the nature of an injunction. The present is a case perfectly within the rule there laid down, as it clearly arises out of a transaction in the execution of the defendant's duty as a revenue officer.

* That was the case of *Cawthorne v. Campbell, Lowndes* and others. The judgment was delivered 12th February 1790, of which I have been favoured with the following note:

EYRE, Chief Baron.—This was an application to the Court (which was supposed, at the time it was made, to be very much in the ordinary course) to remove an action brought by one *Cawthorne* against the Commissioners of Excise, and officers exe-

cuting a *warrant* of distress, on a conviction of *Cawthorne* made by the Commissioners, into the office of Pleas in this Court, upon the general grounds of this being a proceeding in the execution of their office.

This application was very strenuously resisted, as being in itself extremely anomalous, and of course a proceeding very little, if at all, known to the law; and when applied to the particular case, an absolute and mere innovation. The particular case was, as I have in part already stated, an action of trespass, for taking goods by colour of a warrant to levy a penalty of a hundred pounds forfeited by *Cawthorne*, he having been convicted upon an information before the Commissioners of Excise, for not making due entries of tea sold by him, as by law, he, being a vender of tea, ought to have done.

The Counsel for the plaintiff raised a degree of doubt in my mind upon the propriety of extending a course of proceeding which I take to be the established course, to the particular case, and I therefore wished for an opportunity of investigating the subject, if I could, to the bottom. I have taken some pains to search into the precedents, but the searches are not very easily made, and the books are very voluminous; though I have made some progress, it has not been so considerable as I could have wished; but I have seen enough to satisfy my own mind; and although I could have wished to carry my inquiries further, I shall not delay the parties any longer, but shall now deliver my opinion.

In the first place, as to this course of proceeding itself, it is traced, in point of history, in our books, in Hardres, Salkeld, Bunbury, Sir Thomas Parker, up to Trinity Term 13th *Cha.* II. and at that time was certainly treated both by the Bar and by the Court (my Lord Chief Baron HALE presiding in it) as a known regular course of proceeding. In the case of *Earle v. Paine*, Salk. 551. there was a very obstinate resistance to that course of proceeding; and the Court having found it necessary to grant an attachment, there was a strong attempt made to have a prohibition to the Court of Exchequer from the Court of King's Bench: some searches were made, a great many precedents were cited, and in the course of those searches there was a precedent as high as *Henry* the Seventh's time, which is stated in the report to have been a precedent of the very same kind;

however, I have examined the roll, and I find that they were mistaken; that it is not a precedent of the same kind; what the precedent was I shall have occasion hereafter to mention.

I have very carefully examined the minute books for almost the whole of the first fifty years of the present century, and I find in that period more than a hundred precedents of orders of this kind: the probability is, that it is a course of proceeding, in some cases, of very remote antiquity; and I take it, that it has been substituted in other cases in the room of another course of proceeding more severe, though producing the same effect. It will be sufficient to say, that we find it the established course of proceeding, and the known practice of the Court, which is the law of the Court and the law of the land, and we can hear nothing against it. But the more difficult question which remains is, in what cases we are to resort to this course of proceeding?

Let us first see what it is, and how it operates. The usual order is, that the action be removed out of the King's Bench or Common Pleas, or out of any other Court having jurisdiction, as the Courts in *London*, the Courts of *Whitechapel*, the *Marshalsea*, the Courts of the Grand Sessions, the County Courts; for it goes to all these instances; the order is to remove those actions into the Office of Pleas, and that they shall be there in the same forwardness as in the Court out of which the action is removed; yet the order does not operate as a *certiorari* to remove the proceedings, but as a personal order on the party to stay his proceeding there, with liberty to commence his action in the Office of Pleas, and of course calls upon the defendant in that action to appear, to accept a declaration, and to put the plaintiff in the same state of forwardness in the Office of Pleas as he was in the other Court.

The removal of actions in which the revenue is concerned into this Court, operates by way of injunction.

It must be admitted that this form of the order, contrasted with the operation of it, is very exceptionable. I have not hitherto been able to trace the history of the form: if possible it should be altered, because a Court should always, and more especially in personal orders, speak so as to be understood; and not say one thing and mean another. When we talk of removing an action, one should think the action should be removed effectually; but it is not so as to the substance and effect of it. It is

simply an injunction to stay proceedings in the other Court, qualified and softened by a liberty given to sue here; and as an injunction, it certainly would be to be enforced as all other injunctions are; and let me add too, as all the interlocutory orders of all the Courts of Law: for instance, the common order for time to plead, taking short notice of trial, giving judgment of the term, bringing no writ of error, are all enforced, by attachment.

It is very true, that the Courts of Common Law do ordinarily assert their jurisdiction, in respect of the privilege, either of the Court, or of their ministers and officers, in a different manner, by suing out a writ of privilege, and pleading the privilege of one Court, to the jurisdiction of the other, and so submitting the ground of the privilege claimed to the judgment of that other Court. And indeed, the common and received practice and established course of proceedings in those Courts, has made it the law of those Courts and the law of the land.

I should have been, for my own part, perfectly content if I had found that also the law which regulates the proceedings of the Court of Exchequer; and yet, in theory, every Court is properly the judge of its own privilege, and no other Court ought to interfere with it: but, however, that course of establishing the privilege has prevailed with respect to the Courts of Common Pleas and King's Bench as between each other, and perhaps, with respect to the Office of Pleas of this Court too with those Courts in some instances, with regard to the other branches of privilege in the Court of Exchequer, the course and received practice has been to exert the jurisdiction in the shape of an injunction; and surely it is not a very extraordinary thing, that a jurisdiction so anomalous as the jurisdiction of the Court of Revenue in the Exchequer is, should have adopted the course of a Court of Equity in asserting its jurisdiction, rather than that of the Courts of Law, and should therefore rather proceed by injunction than by plea; it is the less extraordinary because I cannot find that there ever was a time when this Exchequer privilege was pleaded.

The Year-books referred to in Salkeld, under the title Privilege*, support what my Lord Chief Baron *Walter* there stated,

* 2 Salk, 546.

that anciently, the course was for the Court of Exchequer to send a writ of *supersedeas* to the Court of Common Pleas, commanding them, in the king's name, to surcease the suit that was before them. As to the Court of King's Bench, a different practice prevailed, for an odd technical reason, that the king would not command himself; and therefore, the junior baron, if the cause arose in the Court of King's Bench, was to carry the writ-book of the Exchequer to the Court of King's Bench, and shew it to them, and there demand cognizance of the suit, in consequence of which the Court surceased. Now surely one cannot be very much surprized that such a course as that should have gone into disuse, and that the personal order should have been substituted in the room of it. I cannot understand how the subject would be benefited, if the ancient course was to be revived, and this to be disused.

Having entered thus far into the nature and effect of the order to remove, I come to what I think the more difficult and important part of the subject,—In what cases are we to resort to this rule. Lord Chief Baron WALTER enumerates four descriptions of persons entitled to privilege: “The causes of privilege in the Exchequer are,

“First, if one be informant for the king.

“Secondly, if one be accountant to the king.

“Thirdly, if one be debtor to the king.

“Fourthly, where one is an officer of the Court, or attends an officer of the Court.”

He does not go on to specify the sort of privilege which those persons respectively are entitled to, nor at what time they are entitled to claim them; but this is certain, that the debtor's privilege is to sue here, and nothing more; the accountant's privilege is to sue and to be sued here, because he is immediately attendant upon his duty; the informer's privilege is a thing which I cannot venture to state precisely; for I do not quite understand what it was that Lord Chief Baron WALTER meant by the informant's privilege; the privilege of the officer is also to be sued here in the Office of Pleas.

But I will add two other cases of privilege; the first of them is, *where any matter properly cognizable on the revenue side of* It is a good ground of removing an

action into this Court, if any matter properly cognizable on the revenue side of the Court is drawn into question elsewhere, or if the matter of the suit touches the profit of the king.

the Exchequer is drawn into question in an action brought in another Court. And the next cause of privilege is, *where the matter of suit in another Court touches the profit of the king.* This last cause I consider as the privilege of the king, as his prerogative, and which he may either waive or assert as he shall think fit; for undoubtedly he may choose his own Court.

Now with regard to the first of those additional causes of privilege, the case of *Sir Ralph Banks v. Sir Thomas Bennet*, in *Hardres* 193, appears to me a decided judicial authority to support it. The case was this: Upon an ejectment brought in the Court of Common Pleas by a person who was defendant here, the plaintiff moved that the action might be laid here, because his title was under an extent of this Court for debts in aid; to which it was answered, that all those debts were pardoned by the act of general pardon, and so the extent was at an end, and that the leases of those lands under the seal of the Exchequer, rendering rent, were determined also, being only *quamdiu in manibus nostris*: yet the Court ordered the parties to prosecute their suit here, because this could not appear but upon examination of the whole matter.

Here then the Court of Exchequer asserted its privilege to have jurisdiction of this ejectment in the same manner in which it is now claimed, merely upon the ground of the matter of the title of the defendant being in the whole, or in part, properly cognizable in this Court; that matter consisted of the extent in aid, the inquisition, the Exchequer lease, and the question of law, whether the extent was pardoned by the act of parliament, and whether thereby the Exchequer lease became void, and the extent discharged. Upon the ground of these questions arising in the cause, the Court entertained jurisdiction of it, not thinking it fit to leave it to another tribunal to judge of the force of those extents and the Exchequer lease, or whether by these acts of parliament they ceased to have force; judging rightly that the whole matter must be gone into, which involved not only whether the extents were pardoned, and the lease void, but whether they were ever good.

In the partial search which I have been able to make, I have found several other instances, I believe not less than a dozen, of actions removed upon the same ground; which were either brought in respect of matters done under the prerogative pro-

cess, and of course upon the proceedings of this Court, or the question in the action involved in it some matter cognizable by the Revenue Court; among them were actions for levying fines and amerciaments estreated into this Court, actions for levying debts upon outlawries, for levying debts upon inquisitions upon extents, for levying debts upon inquisitions on a *diem clausit extremam*, and, in short, all the instances in which the prerogative process is used; and under this head may also be classed the infinite number of actions which are removed, and which it is every day's practice to remove, where a seizure in order to a condemnation is the subject of an action.

I observed before, that Lord Chief Baron WALTER speaks of the personal privilege of the informant for the king; yet it does not appear to me that that is the ground of these removals; and I think it cannot well be, because this removal takes place whether the informer happens to be the seizing officer or no, and whether the informer happens to be an officer of the Customs or Excise, or the Attorney General; and therefore I do not see how the personal privilege of the informer could be a ground for the Court removing an action where a question of seizure will either incidentally or directly arise.

And I am the more confirmed that that is not the ground, because this species of privilege was formerly enforced, as I have already hinted, in another way, and with a very high hand indeed, upon the ground that the very act of proceeding at all before another jurisdiction, to draw into question or in any manner to interrupt the prerogative proceedings in the Revenue Court, was itself a contempt without more.

The roll of the nineteenth of *Henry the Seventh*, which I alluded to, and which is referred to in Salkeld, and is there supposed to be a precedent for removing an action, and for granting an attachment, because the party, after service of the order, took upon himself to proceed, was in truth a proceeding as for an immediate contempt, for levying a plaint in a Court at *Bristol* for a parcel of wine that had been seized and was prosecuted to condemnation in this Court; and it was a very regular proceeding. The *Attorney General* states it as a matter of complaint against the party; there is a *Capias* awarded; he is taken into custody; he is brought into Court; is committed for

the contempt to the *Fleet* ; he is brought up again ; makes fine to the Court ; his fine is regularly recorded ; and then, upon the ground of the fine, he is dismissed.

In this they evidently proceeded upon a general analogy to the proceedings in other Courts, for there is no Court that suffers its process either to be insulted or to be materially interrupted ; and whenever this is attempted, it is a contempt upon which the Courts proceed to grant attachments in the first instance. So that in truth the practice of this Court, which I have described, is not so wild a thing as upon the first view it may be supposed, nor any great stretch of authority. Time, however, has softened this into the course of proceeding which now obtains ; in consequence of which, though the proceeding is commenced in the other Court, as by possibility it may happen that there may be some other question which may constitute a cause of action, but mixed and blended with the question which is properly the subject of the prerogative proceeding, it is fit that under the inspection and controul of this Court, that action should proceed, and the party have an opportunity of trying his right.

But that this jurisdiction was not a very novel thing, nor this a single instance, we may collect from other cases that are very clearly established ; namely, that if a man at this day, there being a seizure in order to condemnation, was to presume to replevy the goods, it would be a contempt of the Court for which an attachment would be granted instantly : so if a distress is taken upon a fee-farm rent, or other duty to the crown, it is considered as a contempt to replevy ; and an attachment will issue upon it ; as appears by the case of the *King v. Oliver*, in Bunbury 14.

There was a case partaking pretty much of the same nature, which appears by the minute-books to have been this : There had been a seizure of some wedges of gold ; it is not very clearly explained in the minute-books, but I take it for granted that the person whose property was seized turned the tables upon the officer, and carried him before the Lord Mayor with the goods, and the Lord Mayor detained the goods in his custody. There was an application to the Court, and the Lord Mayor was ordered to shew cause why he did not deliver these goods into the king's warehouse, in order that the officers might proceed to con-

denation; and the Lord Mayor would have been attached if he had not obeyed that order: the Recorder came and said, the Lord Mayor was willing to submit himself to the Court, and only wished to be indemnified, as the goods had been delivered into his hands; and in that way the thing was settled; the goods were delivered up, and he was indemnified.

Originally, therefore, it seems to me, that to call into question, or in any manner to interrupt the course of the prerogative jurisdiction, was treated as a contempt of the process of the Court, and proceeded against immediately as such. I have stated very proper grounds, as it seems to me, why this was afterwards relaxed, and why it took the present course. So much then for that cause of privilege where any matter which is properly cognizable in a Court of Revenue is drawn into question in an action in another Court.

Another cause of privilege which I stated was, *where the matter of the suit in another Court touches the profit of the king*: and there, upon the prayer of the Attorney General, the action is to be moved; and the case of *Bishop v. Warner*, Hardres 193, which has been cited and relied upon, from the particular circumstances of this suit, as a case in point against the application, proves the general principle to be as I take it; for the Court agreed there, that had the fine immediately concerned the king's revenue, the action should have been removed.

In the case of *Lamb v. Gunman*, in Sir Thomas Parker's book, the action was removed. That was an action between the Duke of Cleveland's bailiff and some other persons of the town of Rye, upon a demand of prisage of wine; and there was an issue joined upon this question, whether the town of Rye was entitled by charter to be exempted from this claim of prisage. The king had a reversionary interest in the prisage, because it was granted to the Duke of Cleveland in tail; and in respect of this interest it was held, that the king had a right to desire that that cause might be removed into the Court of Exchequer; and the cause was accordingly removed.

There are upon the minute-books several other instances to be found of removals of this kind, in respect of the king's interest and profit. Upon the 29th of January, 1734, an action was

removed; it was for money had and received by Mr. *Pennington*, who was the collector at *Bristol*; and it appeared that this action was brought for money which Mr. *Pennington* had received on account of duties on glass. The Court removed the action, and ordered it to be tried here, and not in any other Court; the question being, whether Mr. *Pennington* was entitled to retain that money so received as duties on glass, or not?

I do not know how to say, that this was a case in which the king's interest was very directly touched, because *Pennington* having once accounted for that money to the Exchequer, could never have drawn it back again, even if there had been a recovery against him; but it was incidentally a question in the cause, whether the duties on glass were duties which were or were not to be paid. That was a subject which concerned the king, and therefore the cause was removed.

In a later period, in the year 1777, there was a case, where Mr. *Baring* of *Exeter* brought an action against *Sutlin*, one of the principal officers in the port of *London*, in the same way, in order to get back again money which had been charged to him for duties upon some goods which he thought he was not liable to pay; and that met the same fate; it was removed into this Court.

There was also in an earlier period, in the year 1702, two actions removed. They were under somewhat different circumstances: one was an action of trespass, the other of trover; one was for entering a ship and seizing goods for non-payment of duties, and the other was trover for the ship itself. Both these actions were removed; and the minute only says, "there being an information for the duties." Now an information for the duties is nothing more than the king's action of debt; and therefore there was nothing properly of prerogative in that, except merely the form of suing by information, instead of the common action of debt: but the ground of the removal must have been, that a part of the question in those actions would be, whether the duties were payable or no. If the duties were payable, then it might follow, that the party might have a right to enter the ship and look for the goods, and might have a right to stop the ship and the goods till the duties were paid. If no duties were payable, this justification failed.

There is only one other case which I shall have occasion particularly to mention, and that I can hardly class immediately under any of these heads; but it would rather seem to belong to that class of proceedings where the Court acts by injunction without removing the action: that was on the 10th of *February* 1710, an ejectment brought in the Court of King's Bench; and it was, as to part of it at least, for lands which were part of the queen's estate. There was an application to this Court to stay the proceedings, and the parties were heard upon it. The *Attorney General* attended, and after the hearing, it was put off for a day or two; at length, the entry is, that an injunction issued *pro Domina Regina*. So that the action was not removed, but, simply an injunction went to stay the proceedings. And I think I can see why that was; if the action had been removed, the question could not have been tried, even in the Office of Pleas, because you cannot try the queen's title in an ejectment. The queen was in possession; her hands must be removed by some other course of proceeding than an ejectment; and therefore it was fruitless to think of removing it, and it remained under an injunction. It may be said, that it might be as well left to the King's Bench to determine that they could not recover the queen's land in ejectment. To be sure they might, if the prerogative of the king had not been, that the king had a right to prevent that question being discussed there, and to have it discussed here; and that is what was done.

Then let us see how this general investigation of this subject will be found to apply to the particular case before us.

This action which is now to be removed, professes to draw into question a conviction for the breach of a regulation imposed by the laws for the security of the revenue, under which conviction the king is now become entitled to a moiety of the forfeiture of 100/. which has been levied.

Three grounds of argument for the removal occur. It has been said, and the doctrine and opinion of the Court has prevailed, that the defendants are entitled to remove this action because they are *officers of the revenue*, and that as such they are *privileged* to be sued in the Exchequer.

Another ground is, that the question of breach of regulations for securing the revenue, concerns the revenue, and is therefore to be tried in the Revenue Court.

And a third ground is, that the king has now an immediate interest to support this conviction, in respect of his right in the moiety of the penalty, which by the conviction is now become a debt to the king.

My inquiries have led me to doubt of the first ground of privilege, though it has been for some time considered as of course, and, I believe, upon the authority of a very learned and very able judge, who sat a considerable time in this Court, and who was bred in one of the public offices belonging to it, I mean Mr. Baron *Perrot*, who was of opinion that these are officers entitled to privilege; and I take it to be from him that this opinion has been of late years adopted. My recollection is, that I did myself take it from him, and thought it to have been a sound and solid principle.

On the one hand it is certainly true, that the officers of the excise and customs do claim, and have been allowed in several instances, their writ of privilege from this Court, as officers of the Court, to be discharged from offices. And my Lord Chief Baron *Comyns* himself settled one of those writs of privilege; that which I believe is now in use. And there are several instances in which it has been allowed to them upon application. Two or three are stated in *Burrow*. And it is certainly true, that there have been many modern instances in which the privilege has been allowed to them in this shape for the purpose of removing actions.

On the other hand, I cannot find that they ever had a general privilege to be sued in all personal actions in this Court, which by analogy to privilege of officers attendant upon the Court, they certainly ought to have. On the contrary, the Court has always tied up the case in which they will grant this privilege, of removing the action, to cases in which the action is brought for something which has been done by them in the execution of their office.

Now that being so special, I confess myself to have a considerable doubt, whether that writ of privilege will stand the test of enquiry; and I enter into the doubt started in the argument, whether, if they had privilege of officers, they would have it in this instance, in which they seemed to be exercising a judicial authority, and not acting in their ministerial capacity. These considerations lead me extremely to doubt upon that ground of removal.

The officers of the revenue have not any privilege of being sued in the Court of Exchequer. *Semb.*

With regard to the second and third grounds, I must admit that the case of *Bishop v. Warner* is a much stronger case than the present in one point of view; because a removal being denied in that case, where there were circumstances that seemed to require that it should have been granted, the same reasons there adopted, apply more strongly why it ought to be refused in this case.

I do not know whether it may have occurred to other persons or not, but it is proper for me to state, that there is another case which appears upon the minute-books, conforming to the rule that prevailed in the case of *Bishop v. Warner*, which is the case of *Farrer v. ———*. That was an application, upon the 29th of January 1757, to remove an action of trespass for goods seized and condemned before two magistrates of the county of Cumberland. They were condemned upon the ground of having been imported without payment of duties: and there it was refused to remove the action.

I am also ready to say, that I do not lay any great stress upon the cases of the removal of actions against justices of the peace, or commissioners of excise, of modern date, because I rather believe, the principal ground upon which they have been removed, was that ground of privilege upon which I have already said that I entertain considerable doubts.

Then let us see what those authorities are against the removal. The case of *Bishop v. Warner*, in Hardres 198, was this: The commissioners of excise fined the plaintiff, being a brewer, according to the new act, in 20*l.* for not paying the duty of excise; and upon a return made, that he had no goods whereof a distress could be taken, they imprisoned him; whereupon he brought an action of false imprisonment in the Court of King's

Benoh; and the defendant prayed, that the action might be laid here, because the suit concerned the king's revenue. But this was not granted by the Court, because the fine does not immediately concern the revenue of excise, but is a penalty imposed for an offence committed in it; and it belongs no more to this Court than other like cases arising upon fines and imprisonments; otherwise if it had immediately concerned the king's revenue.

Now I observe upon this case, the Court do not refuse to remove this action, because it drew into question a conviction by the commissioners of excise, with which the Court of Exchequer had nothing to do; but they refused to remove the action because the effect of that conviction in their judgment did not concern the revenue; and they in effect say, that if the fine had immediately concerned the revenue, they would have removed the action, though it was brought against the commissioners of excise and the officers under them.

The Court was most undoubtedly right in the principle upon which they would have removed the action, if it had appeared to them in fact that it concerned the revenue of excise; for it is quite enough, consistent with the authorities that I have cited, that the matter which immediately concerns the revenue is drawn into question by an action. The king has then a privilege to have that action tried in the Court of Exchequer, and this without the least mixture of prerogative process; or whether it is a proper subject for prerogative process only to act upon or not, that is not an ingredient. In the case in Parker's Report, which I have before adverted to, there was nothing of prerogative process; it was merely an issue in an action, whether the exemption of the town of *Rye* was a good exemption or not.

Let us then inquire how the Court, in the case of *Bishop v. Warner*, have applied the principle to the particular case in which they thought it not fit to remove that action. If there was any question at all to be tried, when the action was brought for levying this fine under the conviction, it was a question dividing itself into these two branches: First, were the duties of excise due? In the next place, were they withheld? They could not be withheld unless they were due; and therefore that question would come directly to be in issue, and be necessary to be dis-

cussed; and yet the Court have said that this did not immediately concern the revenue. It appears to me, that the principle was right, and that they have failed in the application of that principle to the particular case; and that upon their own principles they ought to have held, that that action should be removed, because it did immediately concern the king's revenue. It concerned the king's revenue exactly in the same manner as in *Pennington's case*.

They brought an action for money had and received, against *Pennington*. They proved that he had received the money; but as he had received it upon the score of duties; either they must prove that the duties were not due, or he must prove they were due; and therefore the question whether the duties were due or not would be the direct question that would arise in that action: and so in the case of *Baring v. Sutlin*, and incidently in the other case of the two actions of trespass and trover, the manner of entry and taking must be a part of the inquiry; but upon the ground of duties being due and not paid, the question whether the duties were due, would necessarily arise; and that question did immediately and directly concern the revenue, and therefore ought to be tried only in this Court.

If it was sufficient cause to remove the ejectment to try the title to the Exchequer lease, that the whole matter must be gone into, which would include some question upon the Exchequer process, was it not sufficient for the removal of this action, that the whole matter of the conviction involved in it an immediate question of revenue, as well as of fact,—whether the duties had been withheld or no?

If it be said that that question could not arise in the case, for that the conviction was conclusive, then it would be difficult to say what the action was brought for; and it is no answer to the point of removing the action; for in the case of an ejectment to recover lands that were in the possession of the queen, the question upon the title of the queen could not arise in that action; for it was enough that the crown was in possession, and that Court might have resisted the ejectment as well as the Court of Exchequer could do; but still if there was a question to be tried, it was a question not to be discussed any where but in the Court of Exchequer. I consider therefore the principle of the case of

CASES IN THE EXCHEQUER,

Bishop v. Warner as a direct authority for the removal ; and I consider the determination in that particular case a mere mistake in the application of the principle.

Farrer's case probably was determined upon the authority of this case of *Bishop v. Warner* ; if it was not, I cannot imagine upon what ground the determination proceeded ; to be sure it is rather less founded than that, because in it there was a condemnation of goods forfeited for non-payment of duties, in which the forfeiture is the satisfaction to the king for his duties, and in which he was also entitled to a moiety. It does not appear, in the case of *Bishop v. Warner*, whether the king had a moiety of that fine or no ; if he had, that also is a circumstance which helps to weaken very much the authority of the decision.

The regulations for preserving the revenue are properly cognizable in the Exchequer, and any action relating to them may be removed into that Court.

But will it be said that the king has no interest, or that he has not an immediate interest in sustaining a condemnation for goods that are imported without payment of duties, when the forfeiture is his satisfaction, and when he is to have a moiety of the forfeiture, and an immediate fixed interest in it by that condemnation ?

I said, that in one view of these cases, they were stronger cases than the present, because really when they are examined, there appears to have been a direct question, whether the duties were due or were not due ; which immediately concerned the crown's revenue ; and I must admit that here the forfeiture is only for a breach of regulation. My answer to that is, that the king has as immediate an interest in the regulations, and in the jurisdictions which are created for enforcing those regulations, which are the fences and guards of his revenue, as he has in the revenue itself, yet not so as to interrupt the course in which these fences are marked out and delineated, nor so as to interrupt the appeals and writs of error in cases where those appeals and writs of error lie.

But when those regulations are endeavoured to be brought into question in a collateral action, in which those are the very points of discussion which were properly cognizable and determined in the information and conviction ; I say that the king has then an interest to defend them, and he has consequently an

interest to choose the Court in which he will have that question tried, consistent with his general privilege; and upon this ground it is that the informations which are brought for penalties upon revenue and excise laws have never been considered as having much analogy to the common popular informations.

They are brought in the revenue department of the Court of Exchequer, and not in the Office of Pleas; they are excepted out of the statute of King *James*, which directs informations to be laid in their proper counties; they are articles and branches of the revenue, and there is no good solid ground for making a distinction between them and the revenue itself.

I observed that it was not stated, in the case of *Bishop v. Warner*, how the fine was to be disposed of, and that if one moiety was to the king, that furnished an additional argument against the determination the Court then came to; because if it was so, the moiety became an article of the casual revenue of the crown, in which the king was truly and immediately interested: and where such an interest, or any other of the king's rights, under informations, once determined and fixed to be his by judgment, are attempted to be drawn in question out of the Court of Exchequer, the king is in the ordinary case, he has a privilege to have any action tried in the Court of Exchequer which touches his profit, and draws into question that which he claims and is entitled to.

We held, upon very solemn argument, not a great while ago, that the king's moiety recovered in, I believe a popular action, as soon as it was fixed and vested by judgment, became a regular debt to the crown, and was within the act of *Harry the Eighth*, which entitles the crown to be preferred in its execution, as for a debt; so that the crown's interest on the subject is very distinctly marked and affirmed.

A moiety of a forfeiture in a popular action, vested by judgment in the crown, is a branch of the revenue, for which the crown has a priority in process; and is entitled to stop all suits concerning it in any other Court than the Exchequer.

This goes to the third ground for removing this action, upon which, for my own part, I cannot entertain a shadow of a doubt, namely, the interest of the king in the moiety of the forfeiture, which is as much an article of his casual revenue, as the duties of excise are an article of his regular revenue, and in respect of

which alone the king has a right to have an action removed which proposes to draw that debt, that forfeiture, into question elsewhere ; and therefore upon the whole of this case the Court are satisfied that the order ought to be absolute for removing this action.

The rule was made absolute.

ADDIS v. BAKER and Others.

Wednesday,
5th June.

Sale of a share
of a ship is
good without
actual delivery.

Whether an ex-
ecutory agree-
ment for the
sale of a ship
must recite the
registry, under
the 26 Geo. III,
c. 60. s. 17?
Quære.

THE bill stated, that *J. and T. Wright* being indebted to *Addis* in 120*l.* *J. Wright*, who was owner of the brig *Union*, agreed to assign to *Addis* one fourth part of the said vessel as a security for that sum ; and accordingly signed an agreement by which he engaged to make over to *Addis* one fourth part of the vessel on the *Tuesday* following, or pay him 120*l.* and at the same time delivered to him the bill of sale of the vessel. The money was not paid, and *Wright* was about to execute a mortgage of one fourth of the vessel when he became bankrupt. The defendants, *Baker, Brown, and Frisby*, were chosen assignees, and employed the other defendants, *St. Barbe, Green, and Bignell*, ship-brokers, to sell the brig. These defendants, the ship-brokers, not being able to make a good title to a purchaser, from the bill of sale being in the plaintiff *Addis's* possession, agreed to pay him one fourth of the proceeds of the sale, and he thereupon gave them a bond of indemnity to secure

them in doing so. The defendants, the assignees, commenced an action at law against the defendants, the brokers, for the money so paid to the plaintiff *Addis*. - This bill therefore was filed for the purpose of having it declared that the plaintiff was entitled to the fourth part of the vessel, and to stop the proceedings at law on account of the proceeds thereof. The defendants demurred to this bill for want of equity; and the question was, whether the plaintiff had any claim upon the vessel from the above agreement.

Hart, for the assignees, insisted he had not, and relied on the statute 21 *Jac.* 1. c. 19. and the case of *Bourne* and others, assignees of *Peele v. Dodson*, 1 Atk. 154. by which it appears that chattels not reduced into possession by the vendee before the bankruptcy of the vendor go to the assignees: and this case is not within the distinction taken there, of ships at sea, the bill not having stated the vessel to have been abroad at the time; it is also within the 26 *Geo.* III. c. 60, the agreement under which the change of property took place not being shewn to have contained the certificate of the registry.

Cox, contra, relied on the case *ex parte Staggroom*, 12th *June* 1790, where Lord *Thurlow* held the vendee entitled under a bill of sale of a share of the property of a ship, though never actually in possession, on the ground that possession cannot be taken of a portion of the property, and the possession of the other part-owners is the possession of all*.

* Mr. *Cox*, in his note of this case, represented it as so determined. In *Vez.* junior's report of it (p. 163.) it is said to have been undecided.

As to the other point, this case is not like that of *Rolleston v. Hibbert*, 3 Term Rep. 406. That was an *actual* bill of sale by way of mortgage, and was determined on the ground that a Court of Equity would not have considered it as an agreement only, and as such have decreed specific performance of it; because that would be to pervert the intention and meaning of the transaction in order to evade the statute: but this is only an agreement to assign, and so is not, within the statute, nor within that decision. So in annuities, a Court of Equity will decree performance of an agreement to secure an annuity, but will not assist an informal security.

MACDONALD, Chief Baron.—In a question of such general importance as the present, the plaintiff has certainly, to say no more, shewn a sufficient degree of doubt to make it proper that his claim should be investigated in the most solemn mode, at the hearing of the cause, and not be decided in the shape of a demurrer.

The question, whether the stat. 26 Geo. III. attaches on an agreement for the sale of a ship as well as on the actual sale, is very important. I am not at present prepared to say that it does extend so far. The other question has been decided by Lord *Thurlow* in several cases: he considered the sale of a part of the property of a ship, to be similar to that of a ship at sea, as actual delivery cannot take place.

SHORT v. COGLIN.

Same day.

PARK moved for leave to enter up judgment on a warrant of attorney given by the defendant to the testator of the plaintiff. The warrant of attorney was made to the testator alone, but contained a clause of release of errors, to him, his executors or administrators. There was an affidavit of the warrant of attorney having been given for valuable consideration. The motion therefore was to enter up judgment as in the life of the testator, *nunc pro tunc*; and argued that this would reach the justice of the case, as any objection might be adduced on the *Sci. fa.*

By the *Court*.—It was a personal authority to the testator, and died with him.

Rule refused.

MASTER v. MILLER, in Error, from King's Bench.

Same day.

(See the case at length, 4 Term Rep. 320.)

WOOD, for the plaintiff, argued that the justice of the plaintiff's case, it being found that he had given a valuable consideration for the bill, entitled him to recover, unless prevented by some un-

A material alteration in a bill of exchange vitiates it.

bending rule of law. The rule in the case of deeds does not apply to bills; they are of perfectly distinct natures: bills, necessarily passing through a great number of hands, are liable to many accidents: while deeds, being always in the custody of the person interested to preserve them, will never suffer any alteration without the gross negligence or fraud of the possessor; and therefore, even if the alteration is by a stranger, it avoids, 11 Co. 27. or if, on inspection by the Judges, it appears to contain any suspicious circumstances, it is rejected by the *Court*.

The issue on bonds is whether it is the deed of the defendant; in assumpsit the issue is whether he *did* undertake, &c.; and as the undertaking here arises out of the acceptance, it is in truth an issue whether the defendant did accept, which is found by the jury. The bill is evidence of the right of action, but not the only evidence; and it is impossible that the undertaking can be done away by the subsequent loss or alteration of any part of the evidence of it, if enough remain to prove it to the jury: *Price v. Shute*, in *Molloy* 109. is directly in point, for there there was an alteration of the day of payment.

WILSON, Justice.—That case was in 33 *Car. II.* which is subsequent to the two first editions of *Molloy*, and probably added by some subsequent editor; but it is not in point, for that is only an alteration of the acceptance, which may be by parol; and not of the bill, which must be by writing.

Wood.—In deeds where it appears that the party is prevented by any misfortune or accident from producing the deed, he is allowed to recover on evidence of its having existed. *Dyer*, 59. *Gro. Eliz.* 120. 10 Co. 92. b. 3 Term Rep. 151. Here the instrument has been avoided, if at all, by an accident; for as the jury have not found that it was done by any person designedly, which would have been a fraud, the Court cannot now suppose it to have been so: and the rule of an instrument being avoided by an accidental alteration, has never yet been carried beyond the case of deeds.

WILSON, Justice.—Suppose a letter is offered in evidence, of which a considerable part appears obliterated; would that be evidence?

Wood.—Suppose any analogy to deeds should prevent the plaintiff from recovering on the first and second counts, yet he may recover on the money counts, according to the rule established in the case of *Tatlock v. Harris*, 3 Term Rep. 174. The acceptance is an acknowledgment of having received value, and a promise to pay to whoever shall advance money on the bill. Here money has in fact been received by the one and paid by the other party, which is sufficient to support the money counts.

Bearcroft, for the defendant.—The only supposition which could support the plaintiff's demand, is, that the alteration on the bill is a mere accident; but the jury have negatived that; they find that the bill was altered from the 26th to the 20th by

some person or persons to the jurors unknown; this excludes the idea of accident: an alteration in a material part, as this clearly is, avoids a deed upon a principle which applies at least as strongly to bills of exchange. The cases go to deeds of every different description which can only be connected by some general principle of law; and that principle is, that no man shall recover on an instrument unless he produces it free from any material alteration. He must not be allowed to try the experiment of fraud, retaining the certainty of not losing, however the attempt may succeed. This is not a mere technical and unbending rule relating to deeds; but is held not to avoid deeds upon accidental destruction or immaterial alterations; it is considered as a principle to be construed liberally, and therefore is to be applied to all other instruments in the same situation with deeds; bills resemble deeds in having legal consequences attached to their form, which no agreement can otherwise confer. The case in *Molloy* was on an alteration of the acceptance, and besides, is not stated to have been against the acceptor. The difference of the issue on a bond and on assumpsit is immaterial, for non assumpsit puts the whole case in issue. Bills of exchange, as well as bonds, receive legal efficacy from their form, and any thing which alters that form in any material part, must destroy their efficacy as instruments.

WILSON.—Perhaps that is carrying the principle too far. I remember the case of *Texira v. Evans* before Lord MANSFIELD, which was this: *Evans* wanted to borrow 400l. or so much of it as his

credit should be able to raise; for this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond: *Texira* lent 200*l.* on it, and the agent accordingly filled up the blanks with that sum and *Texira's* name, and delivered the bond to him. On *non est factum* pleaded, Lord MANSFIELD held it a good deed.

On navy bills, which are not in their nature negotiable, the common practice is this: a letter of attorney to receive the money, (which is a deed under seal) is made, with a blank for the name: this is always sold with the navy bill, and thus they are negociated from hand to hand till any purchaser chooses to fill up the blank with his own name and receive the money.

Bearcroft.—As to the plaintiff's recovering on the money counts, there is no case made for it; there is no privity between the parties; it is not stated that the defendant accepted for any valuable consideration; and although it is stated that the indorsement was for valuable consideration, yet it does not appear to have been a *money* consideration; it may have been a sale of lands, or any thing else than money.

EYRE, Chief Justice.—On the question before the Court I cannot entertain a doubt. Bills of exchange, as well as other written instruments, the form of which gives them any legal effect, must be preserved, with the utmost caution, free from every circumstance of suspicion; and those instruments

which are in their nature negotiable, and pass from hand to hand, require even greater nicety and circumspection than bonds which are confined to the custody of one person. On bills of exchange dates and sums may often be altered very materially, and the person who makes the alteration has a probable chance of escaping detection among the number of those who are liable to the suspicion. If an unsuccessful attempt to gain by an alteration, only puts the party in the same situation in which he would at first have stood, attempts of this kind would be safe and frequent. It is necessary, for the protection of commerce and to secure the credit of paper money, that the danger of losing the real demand upon it be held up to deter from any attempts to add to the value of a bill. As to the mode in which the case comes before the Court, the issue upon *non assumpsit* is, whether at the time of the plea pleaded, there was such a duty upon the defendant to pay money upon which the law raises an *assumpsit*. It is not whether he accepted the bill: the *prima facie* evidence of acceptance may be discharged by the bill being paid, or by its ceasing to have obligatory force. Here the bill has ceased to have effect, by a material alteration being made in it. The jury have expressly found that the bill was altered by some person or persons from the 26th to the 20th of *March*: an accidental blot falling upon the bill would not warrant such a finding; it implies intention; and therefore the alteration avoids the bill.

MACDONALD, Chief Baron.—I cannot see any distinction which can take a bill of exchange out of

the rule which applies to deeds, as to their avoidance by alteration; the reason and principle of the rule are even more strong in the case of negotiable instruments.

The other judges being of the same opinion, the judgment was affirmed.

RICHARDSON v. the MAYOR, &c. of ORFORD, in *Same day.*
Error, from the King's Bench.

THE mayor and corporation, (plaintiffs in the action,) declared for fishing in their several fishery, in a certain haven called *Orford Haven*, in the parish of *Orford*, in the county of *Suffolk*; and the fish, to wit, 4000 bushels of oysters, of the plaintiffs there then being, seized, took, and carried away, and converted the same to his own use, &c. Second count, for fishing in plaintiffs' *free fishery*, in a certain haven called, &c. Third, in the *several* fishery of plaintiffs in a certain river called *Orford River*, otherwise the river *Ord*, in the parish aforesaid, &c. Fourth, in plaintiffs' *free fishery* in a certain river, &c. Fifth, asportavit of oysters.

Declaration for fishing in plaintiffs' several fishery in Orford Haven.

Plea, averring locus in quo to be an arm of the sea, in which all have a right to fish.

Replication averring exclusive right of fishery by prescription, traverses the general right.

Rejoinder traversing the prescriptive right of the plaintiffs.

Demurrer thereto.

The rejoinder is good: for the traverse in the replication was bad, and the defendant might pass it by.

Plea, first, not guilty; second, that the locus in quo in the four first counts the same, and the fish in all the counts the same; that locus in quo at the said several times when, &c. was, and from time where-

of, &c. hath been, *an arm of the sea*, in which every subject of this realm at the said several times when, &c. had, &c. the liberty and privilege of free fishing; whereupon defendants being subjects of this realm, &c. Third plea, that *locus in quo*, is and from time whereof, &c. hath been, a common and public navigable river, in which the tides and water of the sea, during all the time aforesaid, have flowed and reflowed, and still do flow and reflow; and that in the same river in which, &c. every subject of this realm, at the several times, when, &c. had and ought to have had, and still has, and of right ought to have, the liberty and privilege of free fishing, &c. wherefore; &c.

Replication, as to so much of the second plea as relates to the first, third, and last counts, *præcludi non*, because that *Orford* is, and from time whereof the memory of man is not to the contrary hath been, an ancient town, &c. and the inhabitants are, and from time whereof, &c. have been a body corporate, &c. and that the said corporation, from time whereof the memory of man is not to the contrary, have used and enjoyed, and been used and accustomed to have and enjoy, the sole and several right, liberty, and privilege of dredging and fishing for, and catching and taking, *oysters* in the said place, in which, &c. without this, that in the said arm of the sea, in which, &c. every subject of this realm, at the said several times when, &c. had and ought to have the liberty and privilege of free fishery, in manner and form as the defendant in his said last mentioned plea hath above alledged; and this they are ready to verify, &c. And as to *the*

residue of said plea, and which relates to the trespasses mentioned in the second and fourth counts, *præcludinon*; because that the corporation of *Orford* from time whereof, &c. have had and enjoyed, and been accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, *the free right, liberty, and privilege* of dredging and fishing for and taking and catching *oysters* in the said place, in which, &c. every year, at all seasonable times of the year, at their freewill and pleasure, to wit, at *Orford* afore-said, *without this*, that in the said arm of the sea, in which, &c. (traverse as above,) similar replication, and traverses to the third plea.

Rejoinder, to the replication to such part of defendant's second plea as relates to the trespasses in the first, third, and last counts, *actio non*, because protesting that the town of *Orford* is not, nor from time whereof, &c. hath been a body corporate, &c. he says, that the said place in which, &c. is and at the said several times when, &c. was, and from time whereof, &c. hath been, an arm of the sea, in which every subject of this realm, at the said several times, when, &c. had and ought to have had, and still hath and ought to have, the liberty and privilege of free fishing, *without this*, that the said body politic and corporate, from time whereof, &c. have had and enjoyed, and have used and been accustomed to have and enjoy, and of right ought to have had and enjoyed, the sole and several right, liberty, and privilege of dredging and fishing for, and catching and taking *oysters* in the said place, in which, in manner and form, &c. and this the

defendant is ready to verify; wherefore, &c. And defendant, as to the replication of plaintiffs to the residue of the second plea in bar, and which relates to the trespasses in the second and fourth counts, protesting that *Orford* is not an ancient corporation, and protesting that the corporation have not from time whereof, &c. enjoyed the free right of fishing for oysters, &c. takes issue on the traverse in that replication. Similar rejoinders to the replications to the last plea in bar.

Demurrer to the first rejoinder; and for causes of demurrer, &c. plaintiffs shew the following: for that the defendants have not taken issue on the traverse taken by the plaintiffs, but have attempted to put in issue another matter which is mere inducement, &c.

Judgment in King's Bench *pro quer.* allowing the demurrers.

The case was argued last term by *Wood* for the plaintiff in error, and *Chambre* for the defendants; and again this day by *Bower* for the plaintiff, *Le Blanc*, Serjeant, for the defendant.

For the plaintiff in error.—A traverse may well be upon a traverse, where the first traverse is immaterial, or puts in issue a matter of law. *Yelv.* 200. 1 *Str.* 117. 2 *Str.* 839. *Carth.* 166. *Hob.* 104. 1 *Saund.* 22. It is evident, that on the plea, the general and *prima facie* right is in the public. 4 *Burr.* 2162. 1 *Mod.* 105. 6 *Mod.* 73. 1 *Salk.* 357. The traversing that, is to traverse a *mere*

matter of law, arising from the fact of the *locus in quo* being an arm of the sea. The material point is, that the corporation have a particular exclusive right. That alone is decisive of the right of the parties, and therefore the only thing properly traversable. *Bedal v. Lull*, Cro. Jac. 221. Lord Raym. 41. By the traverse in the replication, the plaintiff might have no right, yet if he could shew an exclusive right in any other person, he would recover, which would be absurd.

It is also bad in this, that it traverses too much. In order to try any fact upon it, the *locus in quo* being admitted to be an arm of the sea, and therefore *prima facie* common, it would be necessary to prove a contrary right in the corporation. Their whole title is by this means in issue, consisting of the fact and legal inference of all their title deeds. But the meaning of a traverse is to reduce the cause to a single point.

It is also bad as surplusage. The plea is completely avoided by the inducement to the traverse. 4 Burr. 2162. . And therefore to go further is surplusage, and to be rejected. Cro. Jac. 221.

The replication is also bad *in toto* for this, that the declaration being upon a claim of several fishery generally, the replication sets out the right of the plaintiffs to be to a several fishery of *oysters* only. This is not the case of a replication which merely does not support the declaration, but depart from it; that may perhaps be cured by the defendant's

rejoining, or the plaintiff have judgment on the badness of the plea: but this replication shews that the plaintiff has no title. It destroys the declaration, and he therefore cannot recover, whether the plea, or the rejoinder in support of the plea, be good or bad. Jenk. 183, *pl.* 71. 8 Co. 133. *b.* Lutw. 129. *Cutler v. Southern*, 1 Lev. 195. Lutw. Ent. 1402. As to these two last grounds of argument, the Court seemed clearly of opinion against the plaintiff in error. /

By this replication it appears, that the plaintiffs not being entitled to the whole fishery, but only to that for oysters, cannot maintain trespass. It should have been an action on the case.

During the argument, it was suggested by HEATH, Justice, that as the declaration describes the *locus in quo* to be a *haven*, which is synonymous with *harbour*, and implies an inlet or arm of the sea, it might be questioned, whether the presumption arising from that description in favour of the public right of fishery, ought not to have been rebutted by prescribing for an exclusive right in the declaration.

For the defendants in error it was argued, If the traverse taken in the replication be material, the passing it by is bad. To see whether it be material, the criterion is, whether the right can be tried upon it. In this possessory action, the defendant, by justifying, admits possession in the plaintiffs; he then justifies under a contrary title in the king's

subjects at large. An arm of the sea may be open to all the king's subjects, or may be confined. The plea states as a fact, that the *locus in quo* is of the former description, that it is an arm of the sea, in which all the subjects have a right to fish: if this averment be good in the plea, the denial of it must be good in the replication.

In trespass on land, plea *liberum tenementum* of the debt, the replication is, that it is the freehold of the plaintiff, and *not the freehold of the defendant*, or, *de injuria sua, absque hoc*, that it is the freehold of the defendant: the question always being, whether the land is the freehold of the defendant or not. There, as here, the right may be in a third person; but it is presumed to be in him in whom the possession is admitted. The plea here is, in substance, that the *locus in quo* is the *liberum tenementum* of the crown, for the use of all the subjects.

The cases prove only, that there is in arms of the sea a *prima facie* right in all to fish. In private streams, the *prima facie* right is in the owner of the adjoining lands. If in trespass in a fishery, the defendant pleads that he is owner of the adjoining lands, and that the fishery is his, the plaintiff might well take issue on the right of fishing, without denying the right to the land adjoining, although that right gave him the *prima facie* title to the fishery, as the being an arm of the sea does here.

The traverse is not bad for putting matter of law as well of fact in issue; that must often arise in pleading. *The Grocers Company v. Backhouse*, 3 Wils.

221. 234. And in every plea of *liberum tenementum*, or in the nature of *liberum tenementum*, the whole title must be in issue.

The objection, that the replication is a departure, or that it destroys the declaration, is cured by the pleading over, as the inducement is only form, and within the 27 Eliz. And if the replication were too broad, yet that cannot be taken advantage of by the defendant, whose plea is of the same matters.

EYRE, Chief Justice.—The Court desired to hear a second argument in this case, rather from the hesitation they feel in reversing a judgment of the Court of King's Bench, than from any doubt arising from the case itself. From the first, we observed this absurdity to arise from the pleading used in this case, that the plaintiffs might recover on the traverse tendered by them, without any right, and even without possession, in themselves. If the rules of pleading allowed of such an absurdity, we must have submitted; but where the rule is not precisely and accurately fixed by precedents, the reason of the thing and general convenience must have great weight.

The replication is bad: It has been said, that this is like the case of a *prima facie* right in a private stream in the owner of the banks; but the cases are perfectly different. That is a mere inference of fact, and therefore the fact inferred only should be stated in the pleading, and the ownership of the banks given as evidence of it. But the present is an inference of law; and therefore the fact

from which the inference is drawn, *viz.* that of the *locus in quo* being an arm of the sea, is the material averment. They have not traversed that, and the traversing the legal inference from it is idle.

Suppose the owner of the soil of a highway brings trespass; the defendant justifies as a public highway for all the subjects to pass and repass at their free will and pleasure; could the plaintiff, stating in the inducement a right of tolls, admit the fact of its being a public highway, and traverse the right of all the subjects to pass and repass? That is precisely like the present case; the *prima facie* right in all the king's subjects can only be taken away by averment of a contradictory particular right; and the issue must be upon that particular claim.

If the issue could be upon the general right, it would involve the question, whether the plaintiff or any other had an exclusive right, with all the facts and legal force of the different titles set up; but by putting the issue on the particular right, the defendant is put to traverse some one part of the titles set up, which answers the real end of special pleas, by reducing the question to a single point. The replication is not so broad as the plea, as has been contended; the plea averred a material fact, of its being an arm of the sea; the replication has admitted that fact; it ought then to have rested upon the avoidance of it by the exclusive claim; but the replication waives that, and goes on to an immaterial traverse, which the defendant was therefore justified in passing by.

The whole facts should have been tried on the general issue; but it is too late to object that now.

Judgment reversed.

Argued,
Tuesday,
7th May.

Judgment,
Friday,
7th June.

The ATTORNEY GENERAL v. PARKE and Others.

THE information stated, that the defendants, being glass makers, after having given notice to the proper officer of the filling and charging a pot with metal or preparation for the making of glass, and after a gauge had been taken by the proper officer in that behalf of the metal or preparation in the pot, did, *without a fresh notice* in writing according to the statute 17 Geo. III. c. 39. s. 33. put into the said pot certain other metal, material, or preparation for the making of glass, contrary to the form of the statute, &c. The statutes which relate to this matter are the 19 Geo. II. c. 12. s. 7. and 17 Geo. III. c. 39. s. 11, 31, 32, 33. The fact proved was, that after the officer had gauged the pot in question, the defendants cracked into the pot the moiles of the bottles as each bottle was made; and the question was, whether this was contrary to the meaning of the statute. The moiles were explained to be a part of the material taken out of the pot with each bottle, and which adhere to the

blow-pipe after the bottle is made. Before the passing the last act (17 Geo. III.) it was the general but not the universal practice of the manufacturers to consider the moiles as waste, and to crack them into the place where the other fragments were put, and all together were called cullet. Since the act, it had become a common practice, but always objected to, to crack the moiles into the pot. Besides the moiles, the waste upon the manufacture of glass bottles is very inconsiderable, consisting only of the drippings in taking out the bottle, and of broken bottles, and what remains in the bottom of the pot; in all, no such waste as to approach to one fifth of the whole quantity: including the moiles, the waste would not ordinarily exceed one fifth; and in the other species of the glass manufacture, the allowance for waste bears a near proportion to the real quantity wasted. When the moiles are returned into the pot, it is discernible from the other materials till equally heated as the rest. It cannot be distinguished, by looking into the pot, whether the material added consists of moiles of the same or a former day, or of other cullet. Each bottle, before it is made, is taken out of the pot, dipped in water, returned into the pot, and taken out again. —Upon this evidence the jury found a verdict for the crown.

A new trial having been moved for, cause was now shewn against it by

The *Attorney and Solicitor General, Newnham, and Leicester*.—The first statute by section 11, only provided for one species of waste, and that by

the discretion of the commissioners; accordingly all the moiles both of the then present, and of any former making, and every other remnant of what had paid duty, might be returned into the pot without fraud: this however opened a door to impositions, fresh metal being put in *under pretence* of being moiles. The legislature therefore provides (17 *Geo. III. c. 39. s. 33.*) that *no* metal, material, or preparation whatsoever shall be returned into the pot; that is, not even moiles, which are one species of *metal, material, or preparation*, and might before have been returned, lest they should furnish a colour for other things; as it is agreed that when they begin to become fluid, one sort of cullet cannot be distinguished from another, or from fresh preparation. It must have been in the contemplation of the legislature that moiles should be reckoned waste, for they have made a provision for it. The act makes allowance for every other sort of glass, according to the common waste; and the allowance of one fifth for glass bottles, must mean to include the moiles, as without them the allowance is out of all proportion. The allowance on exportation, section 35, is upon the same calculation, and would, if the moiles are returned, be a premium instead of a drawback. If moiles of the present making may be returned, so may those of a former, for they are in the same situation, section 33. The only ground of it must be that they have paid duty; so have broken bottles, drippings, and all the cullet. If all these can be returned, as they are the only waste, (that left at the bottom being allowed for separately,) the allowance of one fifth is in fact for nothing at all, which would be an absurdity, and cannot therefore be so understood.

Ross, Adam, and Fitzgerald, for the defendants.
—Whether the legislature intended to make an allowance according to the real waste, is not said in the act; and whether they have done so or not, is immaterial. The act says, that no metal, material, or preparation shall be put into the pot, after gauging. The bottles are within that description; they are taken out and put in again twice before they are finally taken out. If the nature of the manufacture prevents those words in the act from having their full meaning, another, short of that, must be resorted to. The drippings which fall into the pot as the bottle is taken out, are allowed to do so without any objection. The drippings which fall to the ground are waste. The distinction then is, that that which is once separated from the blow-pipe, and is mixed with the other fragments, is waste. The legislature, to prevent other materials from being introduced under pretence of being moiles, has forbidden *any* materials being put in: that must be understood, *any* which could furnish such a pretence. When the moile is broke off in the waste hole and mixed with the other cullet, it would be dangerous to say that part of the contents of the waste hole may be introduced into the pot, part not; but when the moile has never been mixed with the rest, it can give no colour to any other materials; and therefore is not within the mischief to be remedied. If the moile is returned immediately into the pot, it has lost but little of its heat; it is soon mixed with and is lost in the mass of hot materials; but if it is struck off and allowed to cool, it requires to be heated again at the same expence as the original heating. The legislature

never could intend to force the manufacturer to a more expensive mode of carrying on the work, nor to make that waste which would otherwise have been saved. Besides, the allowance is said (section 31.) to be for waste happening *necessarily* in the manufacture; but *this* does not *necessarily* happen, for it is agreed by all the witnesses, that before the act some glass makers did not allow the moiles to become waste. Section 33 is expressly made, not to prevent moiles from being put in, but to prevent fresh materials from being put in under pretence of being moiles: it does not say that *other* materials are put in under pretence of being moiles; but the moiles are, throughout the whole clause, contradistinguished from materials. The legislature admit it a common and fair practice to return the moiles into the pot, by saying that other materials are put in under pretence of being moiles. Moiles could give no colour if they were not usually and properly returned; and if so, they cannot be considered as necessary waste.

This day the Lord Chief Baron delivered the opinion of the Court, that the verdict should stand.—By the 19 *Geo. II.* no waste being allowed for, except for broken pots, and that at the discretion of the officers, the manufacturer was of course entitled to use the whole of the materials, whether they had become waste or not, because he had paid duty for the whole. This opening a door to fraud, as other materials were easily introduced into the pot under pretence of being materials that had paid the duty, the 17 *Geo. III.* takes away the pretence by making both illegal.

In order to prevent the manufacturer from being hurt by this regulation, the legislature have made an estimate of the average waste in this as well as other sorts of glass: in this species of the manufacture one fifth is allowed for waste; and this estimate explains their intention, for the other sorts of waste, besides the moiles, bear no proportion to one fifth of the whole, and therefore they must have been meant to be included. This will be no hardship on the manufacturer, for when the waste is put into the pot again as fresh materials, it then in fact pays duty for the first time.

Rule discharged.

WALKER v. HARRIS.

Friday,
7th June.

ACTION of covenant on an agreement for a co-partnership between the plaintiff and the defendant. The plaintiff being in the trade and possessed of the lease of the house, agreed to take the defendant into partnership, and also to assign over to him a moiety of the interest in the house, "*to commence from and after the 29th day of September then next, on the terms and conditions following; that is to say, the said Joseph Harris shall pay to the said Elizabeth Walker, on or before the 29th day of September next, the sum of 300l. as a premium or fee to be admitted into the said*"

Articles for a co-partnership by which the plaintiff agreed to take the defendant as a partner, and give him half the interest in the lease of the house, to commence from and after the 29th September. The defendant covenanted to pay 300l. on or before that day, as a premium to be admitted a partner. On non payment of

the money at the day, the plaintiff may sue, averring his readiness to have taken the defendant as a partner, without executing or tendering articles of co-partnership or a conveyance of the lease.

“partnership:” it then provided, that the stock should be valued by two persons chosen one by each of the parties, and the defendant should advance a sum equal to the value of the stock: and, after some other covenants, that proper articles of co-partnership should, as soon as convenient, be made out. The first breach of this covenant, assigned in the declaration, was, that the defendant had not paid the sum of 300*l.* on the day limited, although the plaintiff was willing to take him into partnership.

The defendant pleaded, first, that no articles of co-partnership had ever been made; second, that the half interest in the lease of the premises had not been conveyed to him.

To both of these pleas the plaintiff demurred.

Russell, for the plaintiff.—The defendant must insist that these covenants are dependant upon one another; that the money was not to be paid till the performance of the other covenants. But, upon attending to this indenture, it is evident that there are rather mutual and independent covenants to be performed at the same time, according to the distinction taken by Lord MANSFIELD, *Kingston v. Preston*, cited in Doug. 690, 691. The money is to be paid *on or before* the 29th September, the lease is to commence *from and after* that day. The consideration of the 300*l.* was the being let into the partnership, which we were ready to have done; and the articles were not to be drawn up till afterwards, when convenient.

It is settled in *Boone v. Eyre*, 1 H. Black. 273. n. followed in the Duke of *St. Albans v. Shore*, *ibid.* that those covenants only are to be considered as conditions precedent to the other covenants, which go to the whole consideration on both sides: whereas, if the covenant goes only to a part of the consideration, he has his remedy in damages, and shall not plead it as a condition precedent. Here the principal consideration for the payment of the money was the admission into the partnership, which we were ready to have granted. The giving up the half interest in the house does not therefore go to the whole consideration.

Wood, for the defendant.—Anciently, almost all covenants were considered as mutual and independent; but that rule is now relaxed, where the nature of the transaction points out the one as dependent upon the other. *Goodison v. Nunn*, 4 Term Rep. 761. This was not to be the covenant under which the co-partnership was to continue to subsist. The agreement was to be executed on or before the 29th day of *September* for the partnership, and the interest in the house was to commence *from* that time; the 300*l.* is to be paid on or before that day, for and in consideration of his becoming a partner; then the articles of co-partnership ought to have been executed before that day, otherwise the consideration for the payment fails: and by the cases cited, the party who is to make the assignment or grant, is to tender the conveyance in order to claim the consideration to be paid for it; the other party need not demand it.

It is said the interest in the lease is only to commence *from and after the 29th September*; but it cannot commence then, unless the interest has been conveyed to him *on or before* that day: the two acts will then be to be performed at the same time; and the one party cannot maintain an action without a tender of performance of his part. Lord *Aldborough v. Lord Newhaven*, cited 4 Term Rep. 763.

MACDONALD, Chief Baron.—The point upon which this case turns, is merely this, whether the mutual covenants are to be done *uno flatu*, in which case it is clear that the party who chooses to move first towards performance of the agreement is entitled to bring his action, or whether the covenant on the part of either is in its nature precedent. It has been contended that the lease and co-partnership being to run immediately *from and after* the day on which the payment is to be made, the conveyance must be *on or before* that time; but the words *from and after* seem to me to exclude that day; if so, the covenant of the defendant is precedent to the other, and was broken before the other was to be executed.

THOMSON, Baron.—A lease to hold *from and after* any day, may well be, by a subsequent conveyance, to commence from that time: it cannot be by a deed before the day; but the money was to be paid *on or before*; it is impossible that the covenant for the assignment should be a precedent covenant.

The other Barons being of the same opinion, the demurrers were allowed.

CHILTON, one of, &c. v. HARBORN.

Saturday,
8th June.

DECLARATION on a bill of exchange and money counts: judgment by default. A motion had on a former day been made that the bill might be referred to the Master to compute principal and interest, instead of going to a writ of inquiry; when upon consideration of its being the practice of the other Courts, the Court granted a rule to shew cause; but observed, that there might be a question if such practice was not error, as the record contained an arbitrary assessment of damages by the Court, without the intervention of a jury.

This Court will not refer it to the Master to calculate what is due on a bill of exchange, on judgment by default.

Cause was this day shewn against the rule by *Dauncey*, who argued that the practice of the other Courts was so recently adopted, and its effects so little ascertained by practice, that they furnish no example. These cases crept in unperceived. The first case, *Rashley v. Salmon*, went off without cause shewn, H. Blackst. 252.: the next, *Andrews v. Blake*, *ibid.* 529. went upon the authority of the former case, and the convenience of saving expence; *Longman v. Fenn*, *ibid.* 541. was grounded on the analogy to the case of debt, in which a writ of inquiry has been dispensed with, and on some old cases in other actions. The case of *Shepherd v. Chater*, in King's Bench, 4 Term Rep. 275. was decided upon the authority of these cases.

It is true there are some cases and *dicta* to shew that damages may be assessed by the Court in tres-

pass and other actions; but to those it is sufficient to answer that they have not been followed in modern practice. In debt, the Court does indeed alone decide the quantum, out that bears no similarity to the present case. In debt, the judgment ascertains the quantum to be recovered; but judgment in assumpsit only decides that something is due. The rule of referring to the Master has probably been extended to assumpsit from this, that on a similar reference in debt, the Master gives interest under the name of damages, and that he may calculate interest equally well on assumpsit; but there is this difference, in debt the principal is admitted and certain, and therefore the interest is certain; but in assumpsit the principal is not admitted, and its quantum is uncertain.

Even in debt, where there has been any doubt or uncertainty about the quantum, it must be sent to a jury. *Bagshaw v. Playn*, Cro. Eliz. 536. where the debt was in foreign money, and the Court held that a jury must find the value in *English* money: and so in *Messin v. Lord Massareene*, 4 Term Rep. 493. where the case was very like the present, being upon a liquidated debt, the Court refused the application, and Lord KENYON declared himself unwilling to extend the rule further; which seems to imply that the inconvenience was perceived.

One reason given for changing the practice is the convenience of the parties; but convenience is not a sufficient reason for breaking in upon established principles; and here the convenience does not exist: the defendant is to be called upon by a motion of this kind to shew cause why it should not

be referred to the Master ; if he shews cause, both parties must come prepared with affidavits, and must appear by counsel ; and if at last it goes to the Master, the cause shewn being insufficient, the expence is as great as on a writ of inquiry ; but if the cause shewn is allowed, it then goes at last to a writ of inquiry, with this additional expence : and if the plaintiff merely wishes to know the state of the evidence to be produced against him, he obtains that information by this motion. In a late case in the Common Pleas, the Court refused to give the one party inspection of a bill of exchange set up by the other, as disclosing the secrets of the cause.

Le Mesurier, contra.—The cases in the other Courts having appeared so very plain as to pass almost without argument, can be no diminution of their authority ; and if there is no very strong rule of law to the contrary, the desire which the Judges have always shewn to preserve the practice of the different Courts uniform, should weigh much in a question of this sort. The decision of eight out of the twelve Judges is decisive of the legality of the practice, and very strong proof of its expediency.

The principle, that the Court is competent to assess the damages, is very ancient. *Goodwin v. Welsh*, Yelv. 151. and *S. C. Brownlow*, 214. where it was so held in the case of trespass. 14 H. IV. 9. the damages in trespass were increased by the Court. So 3 H. VI. 29. 1 Roll. Abr. 573. 3 Wilson, 62.

THOMSON, Baron.—In the case of *mayhem*, the Court has often held that, on view of the wound, damages may be increased.

Le Mesurier.—So in *replevin*, 3 Leon. 213. (cited by **HEATH, Justice**, in the case of *Longman v. Fenn*.) Then, it is not confined to the case of debt, though most frequent in it, as in debt there is greater certainty. In *Holdip v. Otway*, 2 Saund. 106. which was in debt, the damages given were nearly equal to the debt; and in all these cases the principle seems to have been, that the Court have considered the defendant, by letting judgment go by default, to have confessed to the utmost extent of the damages, and the writ of inquiry as only useful to assist and inform the conscience of the Court in cases of uncertain damage, not as a necessary mode of trial.

In an action on a bill of exchange, when the reference is to compute what is due upon the bill, there is equal certainty as on an action on a bond; for part of the interest may have been paid on a bond as well as on a bill, and the quantum due upon each is therefore equally disputable and uncertain; in general it is a mere matter of figures in both cases, and the bill here cannot be disputed.

If there is any real uncertainty in either, as in *Bagshaw v. Playn*, and in *Messin v. Lord Massacreene*, whether the action be debt or assumpsit, the Court send it to a jury; but not unless there appears really to be uncertainty. It is said in *Glanvil*, 86. that trial shall be *per scriptum vel duellum*;

to the trial *per duellum* has since succeeded trial by jury; but only where the trial cannot be *per scriptum*, which on a bill of exchange it clearly may: and the expedition and saving of expence in the proposed practice are sufficient grounds for the Court to adopt it, if they are of opinion that it is within their authority.

MACDONALD, Chief Baron.—It certainly is highly desirable that the same practice should prevail in all the Courts of *Westminster Hall*, and it is the duty of the different Courts to endeavour to keep it so; but here that rule clashes with another maxim, by which we are held to use the greatest caution in breaking in upon the ancient established practice and rules of the Court.

It has been argued that the practice sought to be established is old and known, and the cases in debt are relied on: but there is a great distinction between debt and *assumpsit*; the issue in *assumpsit* is, whether *any thing, and what*, is due; in debt, whether the sum claimed, or nothing. On judgment by default in debt, it is to ascertain *what* is due; in *assumpsit*, that *something* is due.

There are also some cases produced of the same thing having been done by the Court in trespass and replevin; but the cases are few and straggling, and shew that the power then exercised by the Court was found so dubious in its nature, and so awkward in its application, as to be given up in practice; and accordingly, in debt alone it has continued to be exercised.

It may therefore be questioned whether, if the argument of convenience were ever so strong, we could here adopt a practice founded on a principle so totally different from that on which the Court has hitherto acted. At least the inconvenience in the whole practice must be intolerable, to sanction such a change; but in fact no inconvenience has been shewn in the old practice, nor superior advantage in the new; or rather the old seems to us the most convenient. The saving of expence, or of time, by sending it to the Master, can in no case be considerable, for you can only have, in the first instance, a rule to shew cause, and therefore counsel must be retained. If cause is shewn, that is an additional expence to both parties, of affidavits, &c.; and if the cause shewn is allowed, it goes at last to the jury with this expence superadded. This inconvenience also attends it, that we must in truth try the cause upon affidavits, which is never to be encouraged.

THOMSON, Baron.—It is a sufficient answer to the present application, that it is not now the practice of the Court; whether the Court may choose for the future to alter their practice, is a distinct question. I remember a case in the Court of Common Pleas, on a similar occasion: there was a difference in practice in the Courts of Common Pleas and King's Bench; in the King's Bench, on a trial going off *pro defectu juratorum*, the costs abided the event of the suit: in the Common Pleas it was otherwise. An application was made to the Common Pleas, to order that the costs might, in the particular case, abide the event of the suit. The

Court thought it reasonable to make their practice conformable to that of the King's Bench, and ordered it accordingly in future, but refused the application, as not being *then* the practice. So here, the motion is not according to the existing practice of this Court,

The other Barons concurring, rule discharged.

~~THE~~ v. DUBARRY.

12th June.

An injunction was obtained for want of an answer ; on the answer coming in, exceptions were filed, as cause for continuing the injunction ; on argument, the exceptions were over-ruled ; the defendant thereupon moved to dissolve the injunction, as of course : this was refused by the *Court*, the defendant not having obtained the previous order for that purpose, which is necessary by the practice of this Court. In Chancery it is otherwise.

Same day.

GURPY v. JENNINGS.

Indenture of apprenticeship for five years; the father covenanting for the due service of the apprentice; the son avoided the indenture by leaving the service; it is void against the father also.

ACTION of covenant. The son of the defendant was bound apprentice to the plaintiff by indenture for five years; the defendant covenanted that he should serve the plaintiff during that time, and that he should find him in cloaths and medicine. The declaration assigned three breaches: first, that the apprentice had quitted the service of the plaintiff; second, that the defendant had not found him in cloaths during the apprenticeship; third, that he had not found him in medicines.

The defendant pleaded, that the apprentice had continued in the service, and had been found by him in cloaths and medicine, till a certain day, when he quitted the service of the plaintiff, the indenture being void by the statute.

The plaintiff demurred to this plea.

Walton, for the plaintiff.—The indenture, though for less than seven years, and therefore void as against the apprentice if he chooses, yet is good for every other purpose. *St. Nicholas v. St. Peters*, 2 Stra. 1066. Burr. S. C. 91. The father has entered into separate independent covenants for the due service of the son, and these remain, although the covenant of the principal is avoided. *Walter v. The Dean of Norwich*, Brownl. 21. *Northcote v. Underhill*, 1 Salk. 199.

Gibbs, on the other side.—I admit that this indenture could not be avoided by a stranger; but it has been avoided by the apprentice, and all the covenants must fall with it. The statute 5 *Eliz.* says, that all *indentures, covenants*, and bargains for the *having, taking, or keeping* an apprentice contrary to the act, shall be void. Then this indenture is void; and the *covenants* to secure the plaintiff's *keeping* the apprentice are void. It is therefore not like the cases where one part of an agreement becomes void, and the other independent covenants remain good: here the whole is avoided.

MACDONALD, Chief Baron.—These covenants are completely dependent upon the principal agreement, and must fall to the ground when it is avoided.

NOTHAM, Baron.—If the indenture of apprenticeship is void, all the covenants entered into merely to secure performance of that indenture must, *a fortiori*, be void also.

THOMSON, Baron.—The indenture is for the keeping of an apprentice; then it is clearly void by the statute, and no part of it can be good.

Same day.

LLOYD v. SMITH, Widow, Administratrix.

Bill, charging fraud in obtaining a release; plea, the release supported by an answer denying the fraud: the benefit of the plea was saved to the hearing.

BILL by one of the next of kin of an intestate against the widow and administratrix, for an account, charging that she withholds it under colour of a release, which she obtained from the plaintiff by misrepresentation, and by making him drunk; only 150*l.* having been paid to the plaintiff, although entitled to one-eighth of the residuum, which amounted to 3000*l.*

Plea, That articles of agreement were made between the parties, by which it was agreed, that 150*l.* should be paid to the plaintiff in satisfaction of his share of the residuum; that that sum was paid him, and the receipt given; (without denying the circumstances of fraud charged). To this plea there was added an answer, denying the charges of fraud.

Burton, in support of the plea, argued, that this was the proper mode of pleading, since the cases of *Pope* and *Bish*, ante *p.* 59, and *Edmondson v. Hartley*, ante *p.* 97.

THOMSON, Baron.—It is impossible ever to allow a plea of this kind before the hearing, because if it were once allowed, it could not afterwards be disallowed, however clearly the circumstances of fraud may be made out: you can only expect to have the benefit of it saved to the hearing. If the execution of the release were the

point denied and in issue, this plea would be good alone.

The other Barons assenting, it was ordered accordingly.

POTTS v. ADAIR.

Same day.

BILL, *inter alia*, for discovery of the situation and extent of the plaintiff's glebe lands, which had been confounded with and thrown into lands of the defendant, by the persons under whom he holds.

The answer described divers portions of glebe lands in his possession, "as appears from a plan or map, and rental or particular, of his the defendant's estate, among his papers."

Motion by *Abbot*, for the defendant to produce these documents for the inspection of the plaintiff.

This was opposed by *Burton*, as obliging him to shew his whole title deeds, from the accidental circumstance of another person's property being mentioned therein; and rested on *Davers v. Davers*, 2 P. Wms. 410.

By the Court. You have stated in your answer an instrument which tends to throw light on the

claim of the plaintiff. The confusion arises from the act of your ancestor, in laying the lands together, and you are now bound to assist as much as possible in clearing up the difficulty that arises from it.

It was ordered accordingly.

Same day.

WEBB v. STONE.

THE bill of the defendant's solicitor was referred for taxation; it amounted to 360*l.* and only 14*l.* had been struck off by the Master. The Solicitor now applied for costs of the taxation. It appeared that he, being a country attorney, had come to *London*, at his client's request, to conduct the cause; for this he had charged 90*l.* in a former bill; but payment being refused, and finding that on a reference to the Master that item would be disallowed, he delivered in the second bill, in which it was omitted.

By the *Court*.—Without questioning the conduct of the solicitor, who perhaps may be ultimately entitled to this item, the delivering so different a bill was a sufficient ground of suspicion for the client to apply for a taxation; and therefore it would be improper to punish him in costs.

WEBB v. ALLEN, in Error.

DECLARATION—Trespass for assault and battery and false imprisonment. Second count, common assault. Plea first, not guilty; second, justification to the first count, under Mr. Justice *Ashhurst's* warrant to apprehend the plaintiff, on an indictment for bigamy.

Same day.

In the Exchequer Chamber. In Error.

Upon an imprisonment under a warrant for felony, after an acquittal, of which the defendant had notice, the proper action is trespass.

Replication; That after the making of the said warrant in the said plea mentioned, and before the said time when, &c. that is to say, at the delivery of the king's gaol of *Newgate* holden for the county of *Middlesex* at *Justice Hall* in the *Old Bailey* in the suburbs of the city of *London* on *Wednesday* 16th *February* in the thirty-first year of our Lord the now King, he the said *William* was, by a jury of the country, in due form of law, tried and acquitted of the said offence in the said indictment in the said warrant in the said second plea mentioned; and that he the said *William* brought his action, and exhibited his aforesaid bill therein against the said *David*; for that he the said *David* after the said acquittal of the said *William* of the said offence in the said indictment specified, and well knowing of the same, to wit, on the same day and year in the said declaration mentioned, at *Westminster* aforesaid, with force and arms, &c. made an assault on the said *William*, and then and there beat, bruised, wounded, and ill treated him, and then and there imprisoned and caused and procured him to be imprisoned, and to be kept and detained so there imprisoned, for the said space of time in the said

Action for false imprisonment; *pl.a.*, first not guilty; secondly, a justification under a warrant for felony.

The plaintiff *new assigned* the trespass, as happening after the warrant was spent: plea thereto, not guilty; verdict, generally for the plaintiff, and entire damages. The Court will apply the damages to the issue on the new assignment *ut res magis valeat quam pereat*.

declaration in that behalf mentioned, in manner and form as in the said declaration is in that behalf above alleged; which said trespass herein before alleged, is another and different trespass than the said trespass in the said second plea of the said *David* mentioned; and this he the said *William* is ready to verify: wherefore, inasmuch as the said *Daniel* hath not answered the said trespass as above now assigned, he the said *William* prays judgment, and his damages by him sustained by reason of such trespass, to be adjudged to him.

Plea to new assignment, not guilty. Verdict on both issues, and judgment in the Court of King's Bench for the plaintiff. The errors assigned were,

That by the record and proceedings it appears, that the said supposed trespass, assault, and false imprisonment, in the said first count of the said declaration mentioned, were committed by virtue of, or under colour of, the said warrant in the said plea of the said declaration by him lastly above pleaded, mentioned, and set forth; and that the said warrant, at the time of committing the same, remained and continued in full force and wholly undischarged; for which reason, the committing of the said supposed trespass, assault, and false imprisonment, was not, nor could legally be made the subject of an action of trespass *vi et armis*, but was the proper subject of an action on the case: that the said *William* hath not answered the said plea of the said declaration by him lastly above pleaded in bar, but has discontinued his action, as to the trespass in the introductory part of that plea mentioned: that the said *William* hath, in and by his said new assignment,

confessed the said plea of the said *David*, by him lastly above pleaded, without assigning a trespass substantially different from that which is justified in and by the said last mentioned plea, &c. ,

Marryatt for the plaintiff in *error*.—Wherever an injury is committed under the sanction of a legal authority, although that authority be abused, the action is trespass on the case. Thus in *Beecher v. King*, which was tried at the sittings in *Michaelmas* term 23 *Geo. III.* the plaintiff was arrested for 600*l.* That sum was due at the time the process issued, but was paid before the arrest. An action on the case was brought for this abuse of the process; and the Court held it properly brought in that shape. A Judge's warrant, though issued upon misrepresentation, is a sufficient authority to the officer who executes it, till it is superseded by a competent jurisdiction.

EYRE, Chief Justice.—If the warrant recites an indictment which does not exist, it may be questioned, whether the warrant is any justification, as the basis of the authority fails; and that brings it to the question, whether a warrant which is *functus officio* when the indictment no longer continues to exist, has any force.

Marryatt.—No arrest having taken place upon this warrant, the only question is, whether the trial is a *supersedeas*? A writ that is returnable at a day certain, if executed before the return-day, is a sufficient justification. A warrant has no return-day, and therefore runs till executed.

It appears also here, that the trespass new assigned, is different from that in the declaration. There are two issues, the one on the trespass in the count, the other on that in the new assignment; and both found for the plaintiff. As the damages are intire, they cannot now be separated, or the damages on the declaration waived.

EYRE, Chief Justice.—The verdict is, that defendant is guilty of the trespasses in the declaration mentioned, and also that he is guilty of the trespasses new assigned, and they assess the damages *by reason thereof* to 200*l.* &c. If this is referred to the immediate antecedent, *ut res magis valeat quam pereat*, it is an assessment of damages on the trespass new assigned.

Marryatt.—The new assignment does not profess to set out a distinct trespass from that justified; but sets up what, if any thing, amounts to an avoidance of the bar, by shewing, that the warrant was superseded at the time of committing the trespass. This therefore should have been done by a replication, and is not the proper subject of a new assignment.

Laws, for the defendant in error.—If the force committed is not that commanded by the warrant, it is a trespass. The case of *Beecher v. King* was for maliciously holding to bail; the payment there to the party did not supersede the sheriff's authority. He should have given notice of the payment to the sheriff, to prevent the arrest; and the suffering the process afterwards to take effect, was actionable only for the malice. But here the process itself

was superseded. The defendant is stated in the pleadings to have known of the trial, and therefore a subsequent arrest was not *by virtue* of the warrant, but only under *colour* of it. If the sheriff has taken a defendant in execution, and afterwards suffers a voluntary escape, he cannot retake, though the writ is not then returnable. *Atkinson v. Matteson*, 2 Term Rep. 176. For the effect of the writ is then spent.

The new assignment is in explanation of the count, and states, that the trespass was committed at a different time from that mentioned in the plea, *viz.* after the warrant was become void; and the verdict confirms that fact. The defendant not justifying on the new assignment, cannot have the benefit of the plea, which is to another and different trespass.

EYRE, Chief Justice.—The pleadings here are certainly not well drawn. The plea sets out a warrant, and that *by virtue thereof, &c.* The plaintiff should have replied, admitting the warrant, and traversing the remainder of the cause; but since he has now assigned, and that has been found, the Court cannot say that the defendant has not committed a different trespass from that justified.

The judgment was affirmed.

Friday,
14th June.

DOE on Dem. DUPLEX and Others v. PENRY
and Others.

If at the trial of a cause, the counsel on both sides argue upon the effect of an instrument, as being in evidence, and it is by mistake never in fact produced, after verdict for the plaintiff, the defendant cannot take advantage of the omission.

Whether proof of receipt of rent in the name of the trustees of a charity is sufficient proof of possession in them? *Quære.*

THIS ejectment was tried before the Lord Chief Baron at the sittings in last term. The only witness produced on the part of the plaintiffs, was the officer of the city of *London*, who proved that he had for several years received for the city, rent for the premises in question, which was always paid in the name of the twenty-five trustees of Mr. *Wesley's* chapel; but he did not specify who these trustees were, nor was any occupation by the plaintiffs as such trustees proved. The facts of the cause having been before the Court on a former occasion, (*vi. ante* page 86,) the counsel for the defendant produced no evidence, but addressed the jury upon the effect of the trust-deed, the want of title in the eight new trustees, and rested the defence of his clients on the right of the five dissentient trustees under the trust-deed. The Chief Baron having summed up the case to the jury, the counsel for the defendant then first objected, that the evidence was insufficient, but insisted so little upon it, that it was hardly attended to by the judge. A verdict was given for the plaintiff; and *Plumer* having obtained a rule to shew cause why a new trial should not be granted, cause was this day shewn by

Piggott, Law, and Gibbs, who contended, that this evidence was sufficient against the defendants, until they shew some title on the other side; and whatever might have been the case if this objection

had been taken in proper time, when the plaintiff might, if thought necessary by the judge, have produced further evidence, it is waived by the counsel for the defendant addressing the jury on the fact of this deed, and of possession under it, as an agreed fact. The merits being known to the Court by the affidavits in the former application, and the cause since gone into Chancery, upon an information at the suit of the Attorney General, on the relation of the five dissentient trustees against the others to settle the trust, the Court will not give way to a formal objection against the real justice of the case on an application to their discretionary jurisdiction. *Edmondson v. Machel*, 2 Term Rep. 4; so Salk. 646; and in *Harvy v. Grant*, Trin. 23 Geo. III. and *Golightly v. Thelusson*, this term in the King's Bench, where the Court were satisfied that the plaintiff had merits, formal objections were not allowed to set aside the verdict in his favour.

Plumer and Marryatt, for the defendants.—Here the officer only proves that somebody paid rent. It is not even proved that the plaintiffs were the persons who paid rent; and payment of rent alone is no proof of possession: for then any one who pays rent to the landlord, or to any other person, would thereby obtain a *prima facie* title to land which he never possessed. Payment of rent is only evidence to shew the occupation (already otherwise proved) to be in the character of tenant, but cannot be evidence of occupation; and here, by the nature of the action, possession is admitted in the defendant. The cases cited are all where the evidence has been sufficient to establish the merits,

but the declaration has not accorded accurately with the case proved: here there is no evidence. If this verdict stands, it will lie open, after every verdict to contest the propriety of it, or support its authority on affidavits of new facts. The merits here are not known.

MACDONALD, Chief Baron.—I am not yet convinced that the evidence was insufficient. It is in the nature of this trust, that the trustees should not occupy the chapel, but that all the followers of the sect should equally occupy it: then the only means of the trustees to prove their possession, is by a regular payment of rent to the city, who are the owners of the soil: and this is like the case 2 Show. 126. But at all events, the manner of conducting the cause amounts to an admission of the other facts; and we should not be answering the ends of justice if we were to grant a new trial on this objection.

HOTHAM, Baron.—Whatever might have been my judgment, if the objection had been pressed before me at *Nisi Prius*, I am of opinion, that the defendant has lost the opportunity of questioning it. He has lain by till the plaintiff was too late to adduce fresh evidence; and after finding the Court against him on the main ground, would take advantage of this objection. As we cannot help seeing the merits are with the plaintiff, the verdict ought to stand.

PERRY, Baron, and THOMSON, Baron, concurring in the reasons given by Mr. Baron HOTHAM, the rule was discharged.

CHAMBERS v. BULL.

Saturday,
15th June.

PEMBERTON moved on behalf of the husband, (who sued jointly with his wife in the original bill for property claimed in her right, and was co-defendant with her in this cross bill,) that he might be at liberty to answer separate from his wife; the cross bill being for an account of receipts by the husband; and an affidavit was produced, that the wife lived separate from him, with the plaintiff, and under his influence. 1 Eq. Ca. Abr. 65. pl. 5; and 1 Ch. Ca. 296. were cited.

It was ordered accordingly.

Ex parte WILSON.

Same day.

DAUNCEY moved for an order on the officers of the customs to grant a debenture to *Wilson*, to entitle him to the bounty on the exportation of wheat, upon affidavit, that the wheat in question was laden on board the vessel when the price was such as to make exportation only lawful, but before the vessel sailed the price sunk so as to entitle to the bounty; yet the officer refused to grant a debenture. A case was cited where a quantity of malt belonging to *Calvert*, which had paid the duty,

Whether the time of exportation, so as to entitle to the bounties for corn, is to be counted from the shipping or the actual sailing? *Quære*. The Court will not determine such a question upon a motion for an order upon the officers of the customs.

being burnt, the insurers, (the Sun Fire-office,) moved the Court of King's Bench for a mandamus to make the officer of excise give a certificate to entitle to a return of the duty, as within their jurisdiction to compel a public officer to do a ministerial act: the Court of King's Bench refused the application, as being properly cognizable in the Court of Exchequer. A motion similar to the present was accordingly made here, and granted; and it is perfectly analogous to the common practice of granting a mandamus in the King's Bench.

THOMSON, Baron.—There is this difference; to a mandamus the officer makes a return, which puts the point properly on the record; but a motion like this is only to be determined by the strength of the affidavits on each side.

By the *Court*.—The question is of general importance, what is the time from whence the fact of exportation is to be accounted, in ascertaining the bounties. It would be improper to decide such a question in this summary method. The party may sue the officer; or upon application to the Treasury, justice will be done.

Afterwards, on *Wednesday* the 19th *June*, *Damney* obtained a rule to shew cause, which was discharged upon argument on the same ground as above, *Saturday* 6th *July*, at *Serjeant's Inn Hall*; and the *Attorney General* said that the case on *Calvert's* malt had been by consent.

MURPHY v. CUNNINGHAM.

Same day.

DAUNCEY moved to sett off the costs in an action in the Court of Common Pleas against the judgment in this action, and that the execution should only go for the balance.

Jekyll shewed for cause, that the costs in the Court of Common Pleas were due to the defendant for conducting a suit there, to which the plaintiff was not a party, and the costs not taxed; but it appearing that he had retained the defendant as the attorney in that suit, though for another person, and had undertaken before the prothonotary to pay what should be found due for the costs,

The rule was made absolute.

HEATH v. YEOMANS.

DAUNCEY moved to set aside the judgment, on affidavits that the plaintiff had, from the beginning of the suit, told the defendant that the attorney had not his orders nor consent to begin it or carry it on, and that he, the plaintiff, would not consent to its being pursued further: notwithstanding which, the attorney for the plain-

tiff gave notice of trial and had a verdict, nobody appearing for the defendant. These affidavits were made by the defendant and other persons, and not answered.

By the *Court*.—The affidavit of the plaintiff himself would have been the best evidence of this fact, and as that has not been produced, nor the omission accounted for, the rule must be discharged with costs.

*Monday,
17th June.*

DEAN and CHAPTER of BRISTOL v. DONNESTHORPE.

THIS was a suit for tithes. The defendant set up a modus, but had not paid it; and therefore moved, after answer, to be allowed to pay to the plaintiff the arrearages of the modus, with costs of the suit up to that time, and the plaintiff to proceed further at his peril. The rule was refused by the Court on the ground that such a tender is never allowed, except where the defendant offers to pay the thing demanded, that is, the value of the tithes themselves; and not where he tenders a less sum to make good the bar he sets up against the demand. The Court however then said that they would consider the offer afterwards in the costs, if the plaintiff should proceed. He did proceed; had an issue directed, and abandoned it. The mo-

dus was therefore taken *pro confesso*; and the costs, up to the time of the former offer, were directed to be paid by the defendant; since that time, by the plaintiff: without opposition.

CHAPMAN v. LANSDOWN.

Wednesday,
19th June.

ON going to trial in this cause, the parties submitted to arbitration; and the submission was to be made a rule of the King's Bench. The arbitrator awarded costs to be taxed by the Master of this Court. Seemingly by collusion between the two attorneys, the costs were taxed at an immoderate sum.

Plumer now moved that the taxation might be reviewed.

By the *Court*.—The taxation of these costs was very properly referred to the Master, being the person best acquainted with the costs of a suit in this Court; but that reference was not made by the Court; he did not act as the officer of this Court in it, and we have no jurisdiction over him. It may perhaps be a ground for setting aside the award; but that is for the consideration of the Court of King's Bench.

Same day.

HARDWICK v. MYND.

LEMESURIER moved, on behalf of one of the legatees in this cause, a feme covert, being entitled under the decree to a sum of money in the hands of the Court, that the said sum should be paid to certain trustees in her marriage settlement, who were to receive it, when paid, for the purposes of the settlement: and *Le Mesurier* suggested, that the Court should either let the money be paid on the foot of the settlement, or by consent as if no settlement existed; the feme appearing in Court for that purpose.

By the *Court*.—The regular mode, where the settlement is not mentioned in the pleadings, is to refer it to the Deputy Remembrancer, to see whether there is a settlement or not, and pay over the money according to the trusts.

Nothing was taken by the motion.

Same day.

BABB v. BARBER.

MARRYATT shewed cause why the assignment of the bail-bond by the sheriff should not be set aside. The bail below had become bail above.

The plaintiff excepted; and they did not justify. The practice in that case in the King's Bench is, that the plaintiff cannot take an assignment of the bail-bond; in the Common Pleas he may; and there has never been a decision on the point in the Exchequer. Upon reference to the officers, it was found to be the constant practice of this Court not to allow an assignment in this case, as it would be a contradiction, at the same time to take and to refuse the security of the bail.

MORRIS v. GIRLING.

Same day.

ACTION for words.—Judgment by default.—*Knapp* moved that the writ of inquiry might be executed before the Judge at the assizes, instead of the sheriff.

The Court thought the application perfectly irregular, and refused it.

Thursday,
4th July.

PENNEY v. EDGAR.

PLUMER moved to dissolve the injunction.

The plaintiff two years ago obtained a commission to examine witnesses in *India*, which was not yet returned.

The *Court* thought this was sufficient ground, from the delay, to dissolve the injunction.—Ordered.

FREELAND v. JOHNSON.

BILL to set aside an agreement and release; stating circumstances of imposition and equitable duress in obtaining them. Plea to the whole, the agreement and release. There was no answer, nor was the fraud or duress denied in the plea.

Hollist prayed leave to amend; but

The *Court* thought that a practice not to be encouraged, and over-ruled the plea.

— v. —

PLUMER and *Ray* moved to confirm the report of the Deputy Remembrancer. An hour before the time limited for his signing his report, the plaintiff put in objections. The Master, thinking it too late to take the objections, signed the report.

Hall argued that he ought to be directed to review his report, as the objections were neither allowed nor disallowed, and therefore no exceptions could be taken to it on that ground.

The report was confirmed.

GUISE Bart. v. SMALL and Others.

Same day.

ON Mrs. *Small's* marriage there was a settlement of money vested in trustees, in trust to pay the interest to the husband and wife successively for their respective lives, remainder to their children in such shares as they or the survivor should appoint, and for want of such appointment, among the children share and share alike; and in case that both the husband and wife should die without children, or that the children should all die before twenty-one, then in trust for Mrs. *Small*, her ex-

Money vested in trustees, in trust for husband and wife successively for life, remainder to the children, and in default thereof to such person as the wife should appoint; a deed of the wife, conveying this contingent interest, was established.

cutors, administrators, or assigns; and if she should die without issue, then, as to 1000*l.* in trust for such person as she should by deed or testament, notwithstanding her coverture, appoint; as to one other 1000*l.* to the husband; and as to 1000*l.* the remainder thereof, in trust to pay the interest to the husband for life; and then in trust for such person as the wife should by deed or testament, notwithstanding her coverture, appoint. The husband being in distress, the wife executed a deed, by which she conveyed all her interest in this money to the plaintiff, and executed her power of appointment in his favour. The bill was, to have the consent of the wife taken to this conveyance, and the assignment and appointment established, subject to the claims of the husband and wife for life, and the right of the children.

The case of *Ellis v. Atkinson*, 3 Bro. Ch. R. 565, was relied upon, and it was argued, that this was a conveyance of money in equity analogous to a fine of land at common law, and ought to extend equally far.

The Court took the distinction that the case of *Ellis v. Atkinson* was where the wife had the present interest as well as the property in remainder, and there the money itself was to be paid over; and doubted, if they could establish a conveyance of money which may never be in the wife's disposal; but upon consideration ordered the money to be paid into Court for the contingent trusts of the settlement; and upon taking the consent of the wife in Court, decreed that the conveyance should be established.

GABBIT v. CHAYTOR.

Friday,
5th July.

STEELE moved, on behalf of the defendant, that the costs due to him from the plaintiff in the Common Pleas, in an action for the same matters as the bill here, might be deducted from the costs due from him in equity. This was opposed by *Johnson*, on behalf of the solicitor for the plaintiff, who claimed to have a lien on the costs in the Common Pleas. The question was, whether the lien of an attorney is subject to the equity of this claim, in the nature of a set-off. On the one side were cited *Barnes v. Crafter*, 2 Blackst. Rep. 826.; *Schoole v. Noble*, 1 H. Blackst. 23.; and *Nunez v. Modeglioni*, *ibid.* 217. On the other, the later case of *Mitchel v. Oldfield*, 4 Term Rep. 123.

The rule was discharged.

REX v. CALDWELL and Others.

NEWNHAM moved, on behalf of the crown, that the money levied on this extent by the sheriff of *Lancashire* should, after deducting his poundage, be paid to the collector. The whole debt had been levied upon this extent; another extent for the same debt had issued to the sheriffs of *London*, who also seized goods on it, but the sum being

levied in *Lancashire* before they made their return, no *venditioni exponas* issued.

Dauncey, on behalf of the sheriffs of *London*, claimed that the poundage should be apportioned between the sheriffs, supposing that the crown could pay poundage but once; and that as the sheriffs of *London* had been at considerable risk and trouble, they were entitled to a recompence.

Chambre, on behalf of the sheriff of *Lancashire*, rested on the statute 3 *Geo. I. c. 15.* which (*s. 3.*) gives poundage to the sheriff, and (*s. 9.*) takes notice of one case in which the poundage shall be apportioned, and gives nothing where the execution is not completed.

MACDONALD, Chief Baron.—The statute is very clear, and the justice of the case is with it. The sheriff of *Lancashire*, having completed his levy, is absolutely entitled to his poundage under the statute; no transactions among other persons can affect him. The crown has here found it convenient to have double security; the sheriffs of *London* are entitled perhaps to some recompence for their trouble, but that will be for consideration when a motion is made to have payment from the crown.

HOTHAM, Baron.—The sheriff who has completed his levy is entitled to his full poundage. If it were otherwise, it would be a great discouragement to sheriffs in executing the crown process. As to any other recompence to the sheriffs of *London*, the crown must be heard upon that question before we can make any order concerning it.

RIDDELL v. WHITE and Others.

THE bill was brought by the plaintiff, the impropriator of the tithes in the parish of *Lanchester*, in the county of *Durham*; setting forth an act of parliament, 13 Geo. III. for inclosing certain moors within the manor of *Lanchester*, by which it was enacted, that certain commissioners therein named should, before the 12th May 1774, set out such parts thereof as were capable of cultivation; (so as not to be less than 12,000 acres;) and after assigning public highways, and common quarries, &c. were required to set out 30 acres to the curate of *Satley*, and also a quantity not exceeding 500 acres, nor less than 300 acres, to the justices of the peace for the county of *Durham*, for the purposes therein mentioned; (which was principally to indemnify those whose property might be injured by the lord's working his mines, the right to which was reserved to him by the act; and the residue, (except a certain part directed to be set out to the curate of *Ebchester*, and so much thereof as was thereby directed to be sold for defraying the expences of obtaining the said act, and other purposes therein mentioned,) unto and amongst the Bishop of *Durham*, (lord of the manor of *Lanchester*,) and the other persons having right of common thereon, according to the values of their respective estates to which such right of common belonged; and that the said commissioners should, as often as they should find it necessary, raise, by setting out and selling plots of ground there, a sufficient sum to

An inclosure act directed part of a waste to be sold, *tithe free*, to defray the expences of the inclosure: the rector was not otherwise a party; and the saving clause was, of all claims except of the lord and of the commoners; yet the rector's right to the tithes of the waste sold *tithe free* was gone.

These inclosure bills are not to be considered as merely private acts.

answer all expences and other incidental charges in the obtaining and execution of the said act; and particularly all the charges and expences which might attend or be occasioned by the maintaining, supporting, and defending the boundaries of the said moors or commons, and the right of common of such persons thereon to which no objection should be made before the commissioners, against all such claims as should be made by any person or persons affecting the boundaries thereof, or of any right of common thereon which should be objected to in the manner therein mentioned; and all the costs incurred in supporting the right of common of the commoners, on certain lands claimed to have been theretofore part of the said common, and the expences of setting out the highways, and making and repairing the same, and the charge of inclosing and fencing the allotments made to the curate of *Satley* and the justices of the peace; and also that all such lands as should be allotted to any persons in respect of their respective estates, should be held by them in the same manner, and be of the same tenure, as their respective estates in right whereof such allotments were made, and subject to the payment of the same species of tithe only, in the same manner and to the same persons as they were accustomed to pay, and did then pay, except such lands as should be allotted in respect of any tenements within the parochial chapelry of *Ebchester*; and that all such allotments should be taken to be situate within, and parcel of, the same parishes and townships wherein the estates lie, in respect whereof such allotments should be made: and it was by a proviso therein declared, that the purchasers of the

said plots, &c. should become seized of the same as by them respectively purchased in fee simple, and should be deemed to be within such township as the commissioners should by their award direct: and it was further enacted, that the *lands so to be allotted and sold, and the said allotment which should be set out to the justices of the peace, should be held and enjoyed by them and their successors free from the payment of all tithes and ecclesiastical dues*; the same lands so allotted, and every part thereof, shall be for ever freed, exonerated, and discharged, of and from the payment of all and all manner of tithes and other ecclesiastical rights and duties whatsoever, to any person or persons, or bodies politic or corporate whatsoever: that there is in the said act reserved to all persons, (other than the lord of the manor of Lanchester aforesaid, and all other persons entitled to any right of common thereon, their heirs, &c. and the person or persons who should by virtue of that act make any claim affecting the boundaries of the said moors or commons, or of right of common thereon, which should be determined against him, as in the said act mentioned,) *all such right, title, and interest, as they had or enjoyed in the said moors thereby directed to be divided and inclosed, or could or ought to have had or enjoyed in case that act had not been made.*

The bill then went on to state, that the commissioners under the act caused twelve different plots of ground, containing 1655 acres, lying in the said parish, to be sold to defray the expences of the act, &c. and set out an allotment of 300 acres, lying in the said parish, to the justices of the peace

for the county, and completed the division by an award 13th *June* 1781; that the different purchasers caused most part of the lands to be inclosed, and converted into arable land; but the plaintiff did not demand any tithes during the first seven years after the improvement: that the defendants are occupiers of the parts sold by the commissioners, and therefore ought to account to him for the tithes, his right being within the saving clause.

The defendants demurred, as to the account sought, as being freed from payment of tithes under the act.

Upon arguing the demurrer, the counsel for the defendant produced another act of parliament, 19 *Geo.* III. (both being declared, by clauses within them, to be public acts,) which was made for the purpose of carrying into effect the purposes of the former act, as to that part of the waste which was allotted to the justices of the peace, giving certain additional powers to the justices; in the saving clause of which new act, the right of all claimants of tithes on that portion of the waste, was expressly excepted from the saving.

Burton and Abbot, in support of the demurrer.— Nothing can be stronger than the words made use of in the act; throughout it specifies those rights which shall remain after the allotment or sale of the land by public authority; as the manerial rights of the lord, &c. . This clause, therefore, which declares that the right of tithes shall not remain, is strengthened by the conduct of the legislature as to

similar rights. Those portions of land which would naturally have been titheable in the parish in which they originally lay, are made titheable in those parishes in which the farms lie to which they are allotted, and are to pay only the same sort of tithes as those farms. Then throughout it appears that the right of the tithe-owners was in the contemplation of the legislature. The parties to a private act of parliament are never named in it, and are only known by the context; the legislature affecting throughout the whole act to modify and abridge the rights of an individual, proves that his interests and claims were in the contemplation of the legislature; and the only pretence for saying that strangers are not bound by any act of parliament is, that their claims are not in the contemplation of the legislature.

If this clause does not exempt from the payment of tithes, neither would the other clause, modifying the right of tithes according to the farms to which each portion is allotted, be binding on the tithe-owners: but that has never been disputed.

In all private acts for inclosing wastes, the right of the tithe-owners is taken notice of and bound, generally by allowing them a portion of the waste; but always of less value than the tithes of the whole would have amounted to; as in the present act, by allowing them tithes in a smaller proportion than they would otherwise have claimed; and very properly, for the tithe-owner is the most materially benefited in all inclosures of waste ground: the

commoners, who improve, run the risk of the profit recompensing them for the expence incurred ; but the tithe-owner has a certain gain.

Accordingly in this act the legislature has said that all shall contribute in certain proportions towards those expences which do not immediately arise in the cultivation of the ground, nor are immediately beneficial to any body, but which must necessarily be incurred before cultivation can be attempted ; as the obtaining the act of parliament, the setting out the allotments, roads, &c. To defray these expences each contributes in the proportion in which they are afterwards to be benefited ; lots of lands are sold, the commoners and lord lose their right to the nine-tenths, and the tithe-owner to the other tenth part of the produce. This is no more than a fair sacrifice by the tithe-owner for the benefit he receives, and the legislature, without whose assistance the common could not have been improved, had a right to clog the advantage he received with such conditions as they thought reasonable : and when by sale of these lands free from tithes, and the money raised by it, he and the tithe-owners have gained such advantages, it would be a cheat on the purchasers of these lots to say now that they shall hold them subject to tithes.

The saving clause cannot avail the plaintiff ; he is not within it ; it saves to all persons (other than the lord and the commoners, &c.) all such *right, title, or interest*, as they had or enjoyed in the moors. Tithes are not a right, title, or interest in the land ;

but are a right merely collateral to the land. Cro. Eliz. 161. 11 Co. 13. b. Watson, 402. The rector has only a right to part of the crop when severed and set out; but if the farm is allowed to lie waste, he has nothing.

As it is not within the words, much less is it within the meaning of the saving clause. The general purview of the act is clearly to set aside a particular portion of land, as a productive fund out of which the heaviest expences should be defrayed, and for that purpose to take away all claims and rights which before were charges upon it. If it had meant to except those entitled to tithes, it would have said so: but if there were any doubt, it is explained by the subsequent act, which is made in *pari materia*, and for the putting this act in execution; it expressly excepts the tithe-owner, and is to be considered as a parliamentary exposition of this act.

The clause is also to be construed by the rest of the act itself; one part of the act expressly freeing this portion from tithes, the saving clause must be construed so that both may stand: an enactment that *A.* shall not pay tithes, saving the right of tithe of *B.* is a contradiction; then the saving clause must be construed so as not to extend to tithes, nor be repugnant to the body of the act; but if it cannot be so construed, the saving is void for the repugnancy: Plowd. 553. b. 1 Co. 47. 8 Co. 136. b. Dyer, 231. Shepherd's Touchstone, 78, 79. And all private acts of parliament are to be construed by the same rules as deeds. 1 P. Wms.

252. 1 Saund. 240. *Eaton College v. Fountain*, 3 Wils. 496. Hob. 170. *Ward v. Cecil*, 2 Vern. 711. Sir W. Jones, 339. In many of these cases the repugnancy is not to the whole act, but to a part only. If *A.* leases all his houses and shops, reserving his shops, it is void; but if he leases all the shops except one, there is no repugnancy; for it is the exception of a particular out of a general; whereas this saving clause does not narrow, but wholly destroys the former, and is therefore void according to all the cases.

Although the plaintiff were no party to the act of parliament, yet he is bound by it: for this is to most purposes a public act, like road bills, or canal bills. An act relating to the interests of many femes covert, infants, and others not capable of consent, extending over several parishes and townships, cannot be strictly a private act; and it is declared in the act itself to be a public act. The words here are as strong and public as those in the 32 *H. VIII. c. 13.* under which the abbey lands have ever since been exempted from tithes.

Even if it were a private act, the difference of any person interested being a party or not can only be a circumstance in explaining a doubtful meaning; but where the legislature has spoken so distinctly, that no doubt can remain of their intention, they alone are capable of rectifying any fault they may have committed.

Mr. Solicitor General and Romilly, on the other side.—This is to be considered as merely a private.

act. The clause for declaring it a public act, only relates to the mode of its being taken notice of in Courts of Justice, without being pleaded: but it passes the two Houses as a private bill, and relates only to private rights and advantages; it therefore can only bind those who appear by the contents to have been parties.

The case 8 Co. 136. b. is on a public act, and yet the general words are restrained there to such persons as by the context appear to have been in contemplation of the legislature as parties. 1 Vent. 176. 1 Rep. 47. b. Sir W. Jones, 339. 10 Mo. 115. Such acts are considered merely as parliamentary conveyances.

It never can be supposed that the tithe owner would have consented to an agreement like the present; for the expences which the sale of these plots of ground are to defray, are intended solely for the benefit of the commoners, and not at all for that of the tithe owner. The expences of setting out a portion of land to the curate of *Satley*, of making the division of the common, of maintaining suits to defend the rights of the individual commoners, to oppose other claimants, and to litigate the right of common on another piece of ground, the setting out roads, &c. are merely for the benefit of the commoners: and it is therefore reasonable that they should bear the whole burthen. The general rule of law is, that the parson shall have his tithe even of improvements, without contributing to the expence. The share of the burthen to be borne by the rector on improving

waste lands is an exception, and is ascertained; he loses not only the improved tithe, but his former tithe of agistment also, for seven years; and it would be unreasonable that he should pay his share of the expence of improving, and also lose the whole benefit of it for seven years.

If the farm has a right of common appendant in another parish, tithe of wool paid for the farm discharges from agistment tithe of the sheep in both parishes.

THOMSON, Baron.—The commoners had only a right of common on the waste as appurtenant to the other estates on which the cattle were *levant* and *couchant*; if they paid tithe on the other estate, they would not also pay tithe for agistment on the common, though in another parish. It is decided that sheep which paid tithe of wool in one parish, should not pay agistment for feeding in another on a common appurtenant to the estate on which they paid wool.

It was then argued, that the whole benefit of the act was to the commoners, for it is said by the act, that the commissioners may sell any quantity they think fit, and if any surplus, the money to be divided among the persons having right of common; then the whole might have been sold, and the money divided among the persons having interest in the land, and if the tithes are taken away, the impropiator has nothing in compensation.

It is impossible to suppose the tithe-owner a party to such an act, and the contrary is proved by the saving clause, which excepts from the saving all the parties to the act (2 Blackst. Comm. 345-6.) among whom there is no mention of the tithe-

owner. The legislature can never be understood to have bound those who were not before them, and over whose rights they had no authority. 2 Inst. 112. 1 Inst. 360. a. 8 Co. 138. a.

The case put in 1 Vent. 176. is very strong: if an act is made to settle the dispute between *A.* and *B.* to land, and adjudges it to *A.* however strong the words may be, and without any saving clause, yet the right of *C.* which is not before the legislature, is not bound.

Here the lord or some of the commoners might have been considered by the legislature as the tithe-owners, and if any of them had been so, they would have been bound, being parties; but the act goes on to say, that the rights of persons not parties shall not be bound. The words of the saving clause are the most comprehensive that can be used, and if the legislature had meant to bind tithes, they would have excepted the tithe-owners as well as the commoners.

The impropiator's right being expressly excepted out of the saving clause in the second act, which was *in pari materia*, is a proof that it was considered to be necessary to do so, in order to bind him; and that he was not considered as bound by the first. If he was, the second act, as to this, was useless.

No form of conveyance between *A.* and *B.* can deprive *C.* of his estate. The saving clause is an acknowledgment of want of authority over those

who are not named in it as parties. It is a parliamentary conveyance, with a proviso that it shall have no effect where the contracting parties have not a title; and is therefore not like a proviso or saving in favour of any of the parties. A repugnant saving where void, is only void on this ground, that the party has before granted what he then saves; and where there is a contradiction, it shall be taken most strongly against the grantor. 10 Co. 106.

It may be true, therefore, that a saving in a conveyance, reserving to one party what is inconsistent with the general purview, is void; and the cases cited go no further. The case *Plowd. 560. Dyer 115.* goes upon the ground of there having been nothing to save, and so the saving was ineffectual, not void. So the *Duke of Norfolk's* case, *Plowd. 563. b.* goes upon this, that the leases, &c. made by the king were *ab initio* void, the *Duke of Norfolk* being declared not to have been legally attainted, nor the estates out of him; there was nothing therefore to be saved: and it does not go on the saving being void, as is erroneously said *arguendo*, in 1 Co. 47. a. The case in *Dyer 231*, is evidently, that the particular claim set up was not within the intention of the saving, and is so expressed in *Dyer*, though in 1 Co. 47, it is erroneously construed to be an avoidance of the saving for repugnancy. In *Alton Wood's* case is also cited the case in *Brook*, title *Parl. 119. pl. 77*; that case goes upon this, that the services were gone before the act, and therefore there was nothing to save. And *Alton Wood's* case itself goes on the question,

whether *Walshe* was within the saving of the act 28 *H. VIII.* and not whether the saving was void. As to the case 2 *Vern.* 711, it is there said, that the legal right was saved by the saving clause, although contradictory to the prior enactment; and besides it goes partly on the ground, that the statute creditors had a recompence.

The very nature of a proviso or saving, is to prevent that from being conveyed which would by the former clauses have passed: to a certain extent then it must be repugnant to the former. In the present case, the saving is not repugnant to the general purview of the act: the general purview here, is to establish a contract between the lord and commoners. The right of the tithe owner is only collateral, as in the case put in *Ventris*, in an act to settle the dispute between *A.* and *B.* the saving of the right of *C.* which destroyed the whole effect of the act, yet was only collateral; and therefore not repugnant to the purview of the act. If, however, it be considered as repugnant to the former clauses of the act, it shall repeal the former; for it speaks the last intention of the legislature. *Fitzgibbon*, 195.

As to the purchasers, they took subject to the act, and if they are cheated, it is only by their own misconstruction of its tendency.

MACDONALD, Chief Baron, this day delivered the opinion of the Court.

Saturday,
6th July.
Serjeant's Inn
Hall.

The saving clause in the act of parliament in this case, has been argued to destroy the effect of the

prior enacting clause, which frees the lands in question from payment of tithe. We are of opinion, that it cannot have that force. It falls within the general rule, that a saving repugnant to the purview of the instrument is void. This is like the *Duke of Norfolk's* case in Plowd. and Co. like *Alton Wood's* case; and still more like the case in 2 Vernon.

The general purview of the act of parliament is, in a great measure, to change the whole manner of tithing throughout the manor; to annex lands in one parish to another, and to make them titheable there; and in particular allotments, to take away tithes altogether. The legislature has taken upon itself to change the nature of the land; a change so universal and complete, that without it, the purpose of the act cannot be attained.

If the tithe-owner has a right to disturb the act, as to the allotment exempted from tithe, he may equally disturb that part of it which changes the parish to which the improved lands are to be titheable. We cannot allow him to choose what part he will object to, and of what part he will take the benefit.

In mere private acts, where at the prayer of *A. B.* and *C.* the legislature confirm their contract, the enactment is understood to be merely the conveyance of the parties, and is only binding on them. But here the legislature interfere in another shape: they bind the land itself, and change its nature. By the land being bound, the rights of many persons

who could not be parties, being incapable of consent, are bound with it; and the right of the tithe-owner is also concluded.

Demurrer allowed.

WAKE v. RUSS.

Same day.

BILL for account of tithes of milk. The answer insisted upon a *modus* in lieu of tithe-milk, to pay every tenth day's cheese during the space of twenty weeks; the first cheese to be paid on fifteen days after *Holyrood-day*. The evidence was principally a terrier 1677, in which there were two entries; the first was, "*Every tenth day's cheese* for twenty weeks;" the second entry at the end of the terrier was, "*Every tenth day's skimmed milk cheese*; the first to begin in fifteen days after *Holyrood-day*, and to continue till twenty weeks are expired after *Holyrood-day*." There was evidence of the rector having at one time received a composition of one shilling for every milch cow; no proof was offered of tithe-milk being ever paid; few cheeses had been paid within memory.

A *modus* of every tenth day's cheese during twenty weeks from *Holyrood-day*, in lieu of tithe of milk, is good. *Semb.*

Proof of delivery of a cheese at the house of the tithe-gatherer, but not to himself, cannot be admitted to prove perception of the *modus*.

Burton and *Richards*, in support of the *modus*, offered evidence of payment of a tithe-cheese to a person in the house of the tithe-gatherer, who took it in.—*Per Cur.* The tithe-gatherer's authority is

personal; the act of any other person, not authorized by the clergyman, cannot bind his right.

Plumer and *Short* contended that a modus of every tenth day's cheese was void for the uncertainty; for it is not said that one whole day's milk shall go to it; and so not like the case 1 Roll. Abr. 651. pl. 19. cited.

Per Cur.—The proof of the modus in the terrier is contradictory and uncertain; and on the other hand, there is no evidence of perception of tithe of milk in kind, and the terrier which is signed by the rector seems to imply a modus of some kind; all we can do is to direct an issue.

Same day.

GARNONS Clk. v. BARNARD.

In a suit by the vicar for agistment-tithe the endowment was lost; but he produced an old extent of the rights of the impropriators and terriers in support of his claim to all small tithes except wool and lambs; tithe of agistment had never been paid in the parish;

AFTER a decree for the plaintiff, this case now came on for re-hearing. It was a bill for agistment-tithe by the vicar of the parish of *South Cave* in *Yorkshire*, insisting on that tithe being due to him by the endowment of the vicarage. The defendant was owner of the land upon which the claim was made, and was also lay impropriator of the prebend of *South Cave*, which comprehended the rectorial dues of the parish; as such he claimed to be entitled to the agistment-tithe, insisting that

that species of tithe was not included in the endowment of the vicarage.

the defendant was in the occupation of land in the parish, and also of the other tithes, which he claimed as rector. The Court decreed for the vicar without an issue.

The original endowment is not extant. The oldest evidence produced of its import was an extent found in the registry of *York*, to the chapter of which the prebend formerly belonged, and a copy of the same in the *Cottonian* collection; it was to this effect: *Extenta prebendæ, &c.* “*Pertinent prebendæ in villa de Cave una carucata terræ, &c. et decimæ prædiales totius villæ de Cave, et decimæ fæni omnium pratorum cum decimis: lanæ et agnorem.*” It then went on to state other lands and rights in other parishes and townships; stating in some the right to be *decimæ prædiales et mixtæ*; and in some parishes stated the *rectory* to belong to the prebend; it then proceeded, “*Pertinent vicario,*” &c. and after enumerating many articles of small tithes, beginning with the more important and descending to the inferior articles, and to the *Easter* offerings and other personal dues; adds, “*et omnia minuta, injuste tamen detinentur ab eodem decimæ piscariæ de A.*” &c.

The next pieces of evidence were the terriers kept by the vicars: the first was a terrier of the vicarage in 1716, taken by the then vicar, and signed by him and five of the inhabitants: it began, “*To the vicar belong all manner of tithes except corn and hay, wool and lamb; and are paid as follows, to wit,*” &c. it then enumerates the articles of which the vicars had received tithe, with the manner of tithing the same, agistment not being mentioned. The other terriers were to the same

effect, with addition of some new articles from time to time. The plaintiff proved himself to have constantly received tithe of turnips, which was a modern introduction into the parish; and also to have received in several instances a composition for turnips eaten off the ground by barren cattle.

The defendant proving an ancient payment due to the prebendaries of one penny for every sheep, and one halfpenny for every lamb brought into the parish after *Candlemas* and carried out before shearing time.

The parol evidence as to the right of agistment-tithe was very inconclusive, the witnesses mostly agreeing in opinion that the vicar had all tithes except corn and hay, wool and lamb, but declaring their total ignorance as to agistment-tithe, and denying having ever paid any thing as such, or any composition for it.

The defendant proved a suit to have been instituted by the lessee of the great tithes, in 1757, for agistment-tithe, against one *Newton*, a tenant in the parish, to which suit the then vicar was a party defendant, and in his answer directly admitted that he never thought he could claim agistment-tithe. In that suit there was no decree. Agistment is not included in the terriers subsequent to that time made by that vicar and his successors.

Evidence of the declarations of a man since dead, as to a fact done by himself, is not admissible.

The defendant wished to give in evidence the oath of a witness who swore to have heard *Newton*, the defendant in that suit, in his life-time declare, that he had, after the termination of the suit, paid

agistment-tithe to the impropiators of the prebend ; and *Sutton*, for the defendant, cited *Davies v. Pierce*, 2 Term Rep. 53. and *Holloway v. Rakes*, there cited by *Buller*, Justice, to shew that such evidence was admissible, insisting that these cases establish the principle of admitting evidence of a declaration by a party deceased concerning a fact done by him, and of which he when alive was the best evidence.

MACDONALD, Chief Baron.—I have a great objection to carrying that doctrine further than those cases have gone ; they only apply to the case of a tenant explaining in conversation his situation with regard to two landlords, and his conduct as tenant to them. That relation may perhaps make a particularity in the circumstances of those cases which distinguishes them ; but the present attempt goes to establish that the declarations of a dead man are in all cases to be received.

The evidence was rejected ; as it had also been at the former hearing.

Burton, Graham, and Hall, for the plaintiff.—The endowment itself not appearing, the nature of it is to be collected from the evidence of what has been considered as the right of each party. The *extenta prebendæ* is strong evidence for the vicar : it is found in the registry of the chapter of *York*, and therefore is to be construed most strongly against the prebendary, a member of the chapter, on whose behalf it seems to have been taken, to ascertain and preserve all his rights : accordingly it

describes the claims of the rectory very fully, but those of the vicar in a cursory manner, enumerating the most important articles, and including all the rest under the words *omnia minuta*.

It states the prebend's claims to consist *de decimus prædialibus*, and then enumerates several articles of predial tithes which belong to the vicar ; so that it must mean only that the prebend had *some* predial tithes, not that he had *the* predial tithes. It even seems to have considered hay as not a predial tithe, and to have confined the word to the produce of plowed land ; for it speaks of predial tithes *and* hay. But agistment cannot at all be considered as a predial tithe. The statute 2 and 3 *Ed. VI. c. 13. s. 1.* gives treble damages for not setting out or paying predial tithes ; but no action lies thereon for agistment-tithe. Predial tithes are those which are received immediately by the husbandman, as corn and hay ; but where the profit arises from the produce of the earth being taken and consumed by other animals, the tithes are not predial but mixt.

The extent having enumerated the four articles which the prebendary is to receive, then states the rights of the vicar, enumerating several articles, and then giving all the other small tithes by the words *omnia minuta*. Two articles of small tithes having been given to the rector cannot weaken the force of this general clause, save as to the particular exception. Thus, where *A.* devised *all* his lands to *B.* and then reciting that he had other lands, devised Blackacre to *C.* ; the general clause was held good save as to Blackacre. 8 Vin. 284.

pl. 20. So 8 Vin. 281. pl. 8. For the same reason, if the words *decimæ prædiales*, as belonging to the prebend, meant *all* the predial tithes, yet it would be narrowed by the subsequent exception of some predial tithes, hemp and flax and all small tithes, which go to the vicar.

The next evidence is the terrier 1716, which, as well as the subsequent terriers, expressly assign to the vicar all kinds of tithes except these four articles, corn and hay, wool and lamb. It is true they go on to describe the manner of payment of the most important articles, and omit any mention of agistment; but the words, "and are paid in the following manner, to wit," imply that only those species of tithes are meant to be enumerated, of which the vicar was then in the common perception, and of these only the valuable are mentioned. To enumerate all the minute articles which the vicar had received, or was entitled to receive, if they arose, would be absurd and impossible. Besides, where the whole residue is given, although followed by a *viz.* under which the whole residue is not enumerated, yet all passes. Case of Sir *Brook Bridges's* will, 8 Vin. 295. pl. 13.

In the terriers are mentioned, as titheable to the vicar, many articles both of predial and mixt small tithes which are not in the *extenta prebendæ*: thus, rape and mustard seed, cottages, plows, beer, honey, geese, pigs, ducks, are included in the older terriers, and turnips and potatoes, and other articles which were lately introduced into the parish, in the latter; and are proved by parol evidence to have

been always taken by the vicar without any dispute on the part of the impropiators. Some of these are predial tithes, and yet go to the vicar by virtue of the general words *omnia minuta*.

Usage has always been allowed to explain ambiguous evidence of an endowment: thus the word *altaragium* has been held to mean all small tithes, where there was evidence of perception of all small tithes under such an endowment. Bunb. 79. Then the constant perception of each new species of tithes, as it arose, explains the *extenta prebendæ*; and agistment being now first demandable in the parish, must, like those other articles, be included under the general words *omnia minuta*.

They also relied on the evidence of the payments for turnips eaten off the ground by barren cattle, as an actual perception of agistment-tithe by the vicars; as there could be no other right in which such payment was demandable.

Mr. Attorney General, Mr. Solicitor General and Sutton, for the defendant.—As the endowment in this case cannot be found, the vicar, in order to establish his claim, must produce some other evidence to prove what was the purport of the endowment; for, till such a claim is made out, the common-law right of the rector prevails.

As far as we can judge, from probability, concerning the nature of the endowment, we cannot suppose agistment-tithe to have been included in it. Probably the endowment was in the nature of a di-

vision of the tithes then in perception. Agistment-tithe was always payable, and therefore if it arose in the parish at the time of the endowment, and was meant to be given to the vicar, it was too important an article to be omitted in the extent ; but if it was then unknown in the parish, as is probable from its never having been received by any body within memory, it is not to be presumed that the parties had it in contemplation to convey a thing then not known to either of them. Where indeed the vicar has received all small tithes which have actually come to the perception of either, that has been held to be evidence of a general endowment of all small tithes, and therefore carries all new productions, *Paine v. Pawlett*, and the case 1 Wils. 170. ; but here it clearly was not the intent of the parties that all small tithes should go to the vicar, for wool and lamb are payable to the prebendary. Thus in *Kesne v. Patrick*, where the endowment was *totum altaragium*, but the agistment had never been received by either, the Court held that the perception of many other small tithes under the endowment was not sufficient to establish a right of agistment ; and the vicar's bill was dismissed. The small tithes being divided, no general presumption arises from the greater number being given to the vicar, and the common law right of the rector must prevail. The evidence only ascertains what has been received by each party, and does not at all establish a general division of the tithes.

The *extenta prebendæ*, the most important part of the evidence, has clearly been taken by some steward ignorant of the legal import of the terms

he uses ; he gives all predial tithes to the prebend, and then gives several species of predial tithes to the vicar. If *omnia minuta* means all small tithes, there is another contradiction, having given two kinds of small tithes, wool and lamb, to the prebend. Such an expression, by one who clearly did not understand its meaning, cannot convey a right.

The extent, as far as it goes, is rather in favor of the rector ; it expressly gives him all the *predial* tithes, among which agistment is carried ; for agistment-tithe is due for the herbage eaten by the cattle, and not for the improvement, or for any produce of the cattle themselves, as was clearly established by the late Lord Chief Baron in the case of *Ellis v. Saul* in this Court, Hil. 1790.

The *extenta prebendæ* having enumerated all species of tithes then received by the prebend, it next enumerates those in the perception of the vicar, and immediately after mentioning some vicarial dues other than tithes, it adds, *omnia minuta*, all inferior articles of the same kind with the immediately preceding : had it meant all small tithes, it would have been in the feminine gender, *omnes minutæ decimæ*.

The terriers of the vicars are the next evidence, and are to be taken with great caution. They are drawn up by the vicars and churchwardens, the impropriators not being parties. A terrier drawn up by a rector or vicar alone, or by him and churchwardens appointed by him, is no evidence

against the parishioners, because they are neither actually nor virtually parties to it: but if signed by a churchwarden chosen by the parishioners, it becomes evidence against them. Here the terriers are signed by the vicars, who were interested to diminish the rights of the prebend, and by the churchwardens, who had at least no interest to defend them. If then they are admissible as evidence at all, at least they are to be taken with great caution.

The terriers only profess to be an account of tithes actually received. "To the vicar belong all manner of tithes, except corn and hay, wool and lamb, and *are paid* in the following manner," &c. Then those only are meant which had been paid. Under the *extenta prebendæ*, the only general words in favor of the vicar are *omnia minula*, and therefore wood, a great tithe, belongs to the rector; but if the terriers are to be taken literally, wood, not being one of the four excepted articles, would go to the vicar: the terriers can only refer therefore to those tithes which had been received.

Besides, the parishioners all avow their ignorance of the right to agistment-tithe, and one of the vicars, who was defendant in the suit against *Newton*, disclaims any pretensions to it: the terriers left by him are in the same form with the rest, and are to be construed with them. But those who acknowledge, in express terms, their ignorance of this right, cannot be understood to have given testimony of it by any general words, and therefore

the terriers must be considered as being totally silent as to agistment.

The vicar attempts also to prove perception of agistment-tithe, by the payments made to his predecessors for turnips eaten off the ground by barren cattle: but when coupled with the ignorance of any right to agistment-tithe, avowed both by the parishioners and the vicars, that claim fails; it was not paid as an agistment-tithe, and therefore is no evidence or admission of the right. To pay for turnips eaten off the ground, as tithes of the turnips, is a natural and very common mistake into which this parish had evidently fallen. In 1757, agistment-tithe was of sufficient importance to be the subject of a suit: the subsequent terriers do not pretend to give it to the vicar, although then in the contemplation of the parties by the suit. This is an admission of want of title in the vicar, and is evidence for the rector without actual perception by him.

For the prebendary, however, there is evidence of an immemorial perception of one species of agistment-tithe, or of a composition or *modus* in lieu of it. The payment of a penny for every sheep, and a halfpenny for every lamb, brought into the parish after Candlemas, and carried out before lambing time, can be referred to nothing else; it cannot be a wool-tithe; every sort of tithe arising from sheep is only a satisfaction for the pasturage of these sheep. *Degge, 251. Ambl. 149.* When tithe of wool or lamb is paid, no other satisfaction is due;

but if the sheep are depastured at such a time of the year that neither of these arises, agistment-tithe is due of common right; the latter is the case here, and therefore the money-payment is to be considered as the immediate satisfaction for the pasturage which was due, and not as a compensation for another sort of satisfaction which was not due.

It is ordained indeed by a constitution of archbishop *Winchelsea*, that where sheep are removed between shearing time and Martinmas, the tithe-wool is to be proportioned between the different parishes in which they have remained for thirty days, 3 Burn. 460. 463. Lind. 194, 197.; but that never was law, and only related to the division between the clergymen; the whole wool-tithe being paid where shorn, and a proportion afterwards paid by one rector to the others.

As a *modus* for wool, this payment would be bad. The whole wool is afterwards payable in the parish into which the sheep are carried, and it would therefore be without any consideration.

Here there is no custom to exempt sheep introduced into the parish between Martinmas and shearing time from paying the whole tithe-wool; so that if this is a wool *modus*, the rector receives more than the whole year's wool; to wit, the whole wool at the time of shearing, and also a proportion of that carried out of the parish before shearing time. Where the manner of tithing the wool is altered so that the custom gives advantages to both parties, it is good. 1 Roll's Abr. 649. 3 Burn. 464.

See the note at the end of this case.

So *Ellis v. Saul*, in this Court, Hil. 1790.— There were two moduses, the one for the wool of all sheep brought into the parish after Candlemas, and shorn there; the other for the wool of all sheep carried out of the parish between Candlemas and shearing time; and both were held good. There the one modus was a consideration for the other; but if the present is a wool modus, the farmer has no compensation for it.

If this be considered as an agistment-tithe, or composition, it may be fair and equal, and its foundation legal: it is too much therefore to expect that the Court will treat it as a wool modus, which could not legally exist, and supposes an immemorial imposition practised by the prebendaries upon the parishioners.

If this is held an agistment-tithe or modus, although only for sheep under particular circumstances, yet it is a sufficient perception of that kind of tithe to entitle the prebendary to it, so far as it is not covered by this modus: as a bad modus or composition is always evidence of the right being in the person to whom such payment has been made. This was ruled in the case of *Travis v. Oxton**, Exch. 18th December 1775. And as sheep

* There is a very loose note of this case in 2 Rayner, 762.

TRAVIS v. OXTON, 18th December, 1775.

A modus of a penny, in lieu of tithe of hay of the lands occupied with

The vicar, the plaintiff, claimed to be endowed with tithe of hay. The occupiers set up, and clearly proved in evidence, a modus of one penny, called the tilt-penny, for the lands occupied with every farm-house in the parish, in lieu of tithe of hay

were formerly the principal or only species of cattle depastured in this country, perception of agistment-tithe of sheep during that part of the year when they yield no other tithe, is evidence of a general right to agistment-tithe.

Payment of tithe of hay is a discharge of tithe of grass of that land, 1 Roll. Abr. 640. 3 Burn. 429.; therefore, unless the contrary appear, tithe

of these lands. The number of these tilt-pennies payable to the vicar, had necessarily varied from time to time as the lands were divided among a greater or smaller number of occupiers. The Court held this modus clearly bad on account of the uncertainty, and relied on *Turton v. Clayton*, Bunb. 80. They then proceeded to decree payment of tithe of hay in kind; for a modus bad in law, is a valid composition so long as it is allowed to subsist, and is a satisfaction for the tithes during that time; but the receipt of any payment in lieu of any species of tithes, is as much a perception of that tithe as payment in kind; and perception of tithes by the vicar is evidence of an endowment; and therefore supports the allegation in the bill.

each house in the parish, is bad
A modus, bad in law, received by the vicar, is proof of endowment of the tithe for which the modus was paid.

(The judgment was delivered by Mr. Baron EYRE, for the Lord Chief Baron SMYTHE, who was unable to attend the Court.)

The defendants appealed to the House of Lords against this decree, and seem to have rested principally on its not having been clearly made out that this tilt-penny was in lieu of hay-tithe. And upon this ground, and the non-payment of tithe of hay in kind to the vicar, Lord Mansfield thought that the claim of the vicar should not be decreed in a Court of Equity against the common-law right of the rector, where no endowment appears, and any doubt is raised in the proof. Upon his Lordship's motion, the House of Lords, on the 26th January 1779, reversed the decree, and directed an issue to try, "whether the tilt-penny had been accepted and paid as a composition or modus in lieu and satisfaction of tithe-hay."

See 3 Bro. P. C. 482.

of grass depastured should be supposed to belong to him who has the tithe of hay; for otherwise, payment to the rector is a discharge against the vicar.

The reason given why grass depastured pays tithe is, because, if made into hay, it would have been titheable; then it should pay tithe to him who would receive the tithe of the hay. 3 Burn. 432.

If the Court are not satisfied of the right of the rector, at least the decree must be varied so far as to try the fact by an issue, whether agistment-tithe, especially of sheep, was comprized in the endowment or not. There can be no reason to fear the prejudices of jurymen the one way or the other, for although the defendant is here sued only as a landholder, yet the real question is between them as two claimants of tithes. The different accounts given by the witnesses, as to agistment; the evident mistake of some of them in considering small tithes and vicarial tithes as synonymous, and therefore testifying that the vicar had all the small tithes; the uncertainty as to the event of the suit in 1757; the doubtful credit of the terriers; the disputed fact of perception of agistment modus by each party, make this a case peculiarly fit for the decision of a jury. Courts of Equity have, indeed, the power, where the facts are perfectly clear, of deciding without an issue; but the constant practice and discreet use of that power has established it as a rule upon their discretion, never to decide against the common-law right, where the smallest doubt is raised, without the intervention of a jury. 1 Raym. 240. Bunb. 239.

In the case of *Paine v. Pawlett*, where the vicar claimed a small tithe, and proved perception of all small tithes, except grass seeds, which had been taken during the last fifty years by the rector, the Court did indeed give judgment for the vicar, holding themselves bound by the decisions, that perception of all the small tithes actually received was evidence of a general endowment of small tithes; but Lord Chief Baron EYRE, in giving judgment, said, that if these decisions, or the circumstances of the case, had left the least doubt in his mind, he would have directed an issue according to the general principle of Courts of Equity.

In the case of *Scott v. Airey*, in the Exchequer 1779, where the rector claimed tithe of grain on lands occupied by the defendants, the defence was a claim of the tithes as a portion of tithes, and possession, by virtue of that claim, clearly traced for 150 years, with many different conveyances of the right. The Court refused to disturb the *prima facie* title arising from so long possession, even so far as to direct an issue, but left the plaintiff to pursue his remedy at law.

So in the case of *Mawbey Bart. v. Edmead*, Hil. Term 1784, where one layman filed a bill against another to establish a right to tithes in certain farms; the Court dismissed the bill; for, *per Curiam*, the possession being doubtful, the plaintiff must first establish his right at law, which is the proper tribunal for the trial of right on equivocal possession, and for the construction of deeds under which parties claim.

In the case of *Edwards Clk. v. Lord Vernon*, Exchequer 1781, where, to a bill by the spiritual rector, the defence set up was, a title to the tithes under family-settlements, and possession for seventy-one years; the Court thought the decision in *Scott v. Airey* right, and, upon the authority of that case, dismissed the bill with costs.

In the case of *Travis v. Oxton*, the tertenants having set up a payment in lieu of tithe-hay, which the Court considered as a bad modus, and thereupon gave judgment for an account of tithes, considering the vicar's claim as established by the payments; upon a writ of error, the House of Lords directed an issue to try the nature of the payments; Lord MANSFIELD declaring his opinion that, on a vicar's title being disputed, unless it is perfectly clear, a Court of Equity ought not to have made a decree without the fact having been ascertained by a jury. 3 Bro. P. C. 482.

In the case of *Carr v. Henton*, in this Court 1784, where the vicar sued for all small tithes, (whereas the impropiators of the rectory denied the endowment,) and he produced a decree in the Exchequer for an account of all small tithes in a suit by his predecessor, in the reign of Ch. I. yet as that decree was not binding, the patron not being a party, and as it had never been acted under, the Court thought the case not so clear as to warrant a decree in favor of the vicar, and directed an issue to try whether he was entitled under the endowment or

not; and that decision was affirmed in the House of Lords*.

If the defendant, as rector, had sued any other tertenant for agistment-tithe, and the penny and halfpenny modus, or the right of the vicar to agistment-tithe had been set up as a defence, the Court would, as of course, have directed an issue to try the nature of the modus or endowment, before they would decree against his common-law right as

* *CARR v. HENTON and Others.*

In the
Exchequer.
28th June,
1784.

In this cause the plaintiff claimed all small tithes by virtue of an endowment to that effect, which he produced. The defendants insisted that he was only entitled to a yearly payment of 6*l.* 13*s.* 4*d.* from the rector, to whom all the tithes belonged. It appeared that in fact this salary had long been paid to the vicar in lieu of all tithes subsequent to the endowment; and in king *Henry* the eighth's time a survey was taken of the parish, by which this salary alone was found to be due to the vicar; and in fact the rectory was frequently afterwards granted by the crown, with all tithes great and small, reserving the pension of 6*l.* 13*s.* 4*d.* to the vicar. The vicar had never had possession of the small tithes as far back as could be traced. On the 14th of *October* 15 C. I. a suit being instituted in this Court by the then lay rector (who was patron of the vicarage) to have his title to all tithes and the pension of the vicar established (to which the ordinary was not a party); the Court declared the vicar to be entitled, under the endowment, to all the small tithes. This decree was never put in execution; the parties having probably soon after come to a composition, by which the vicar had agreed to accept 13*l.* yearly, whereas the tithe of wool and lamb at that time was proved to have amounted to 90*l.* a year. Since the time of the suit that payment of 13*l.* a year had been regularly received by the vicar.

Upon this case the Court directed an issue to try whether the vicar was entitled to all the small tithes. This decree was affirmed by the House of Lords.

rector. So if the vicar had sued any other farmer for agistment-tithe of sheep carried out of the parish before shearing time, and the penny and half-penny modus had been insisted upon as a defence, the Court must have directed an issue to ascertain whether the wool or the agistment was the thing covered by that modus, as was done in the case of *Bennet v. Read*, in this Court 1785, upon the farmer setting up an agistment-modus. But if in either character singly, as rector, or as an occupier of lands, the defendant would have been entitled to have the opinion of a jury upon his claim, the uniting these two characters cannot deprive him of that benefit.

Burton, in reply.—In discovering the true nature of the endowment, it certainly is material to consider the manner in which such an agreement would probably be made. The tithes were to be divided between the prebendary and the vicar. They have not divided them into great and small tithes. It was hardly possible to enumerate all the different articles which then did or afterwards might arise in the parish, and allot each article separately. The natural and probable division then was, to give certain articles to the one, and all the rest to the other party. The whole evidence, the *extenta prebendæ*, the terriers, and the perception of each new species of tithes successively, prove such to have been the agreement, and the general clause to have been in favor of the vicar; while there is not one hint, in any part of the evidence, of a general clause in favor of the rector. Whether that general clause extended to all other ties, according to the ter-

riers, or to all other *small* tithes only, according to the *extenta*, is immaterial, the present demand being covered by either: but if it were material to determine that question, greater credit should be given to the terriers than to the *extenta prebendæ*; for the latter appears to be taken for the prebendary's use alone, whereas he, being also a landholder in the parish, is constructively a party to the terriers as well as the vicar; and therefore, if there were any tithe of wood, it should go to the vicar.

The payment of one penny for every sheep, and one halfpenny for every lamb, brought into the parish after Candlemas, and carried out before shearing time, is evidently a *modus* or payment for the wool carried out on the backs of the sheep. The canon law ordained a division of the wool between the two parishes, and the ordinance of archbishop *Winchelsea* confirms the same rule; though never perhaps, the law of this country, yet it was generally understood to be so. By that ordinance no part of the wool was due, unless the sheep had depastured for thirty days within the parish; and the proportion of the wool increased according to the number of days above that time: to avoid all disputes and frauds as to the number of days during which they remained in the parish, an average of payment for all is a fair and just composition.

In *Ellis v. Saul*, *EVRE*, Chief Baron, sustained similar *moduses* on their own strength alone; he there said, that he did not know why a customary payment antecedent to the tithe being due, may

not be a good custom; that the rule of the canon law is founded in great equity; and he saw no reason why a custom in analogy to it might not be good.

If this were an agistment payment, it would not be confined to sheep brought into the parish at any particular time, but would extend to all barren sheep or other cattle. The payment for agistment of lambs would be plainly unjust, for during that part of the year the greater part of the lambs could not have begun to eat grass, and no agistment-tithe can be due while they are sucking.

If it appear clearly to the Court that, according to the evidence, agistment-tithe belongs to the vicar, there can be no reason for sending it to an issue. An issue is only intended for satisfying the conscience of the Court upon disputed facts. Here the whole rests upon ancient writings and papers, of the meaning and credit of which a jury can be but very imperfect judges; and which ought therefore to be decided upon by the Court alone. *Moseley*, 266. Even upon mere matters of fact a Court of Equity often decides. *Pocock v. Titmarsh*, Bunb. 102. And so in establishing a modus. *Finch v. Maisters*. Bunb. 161. The rankness of a modus is a mere matter of fact, and yet has always been decided by the Courts of Equity, without any jury, where they have seen no doubt. *Pike v. Dowling*, 2 Blackst. R. 1257. and *Moore v. Beckford*, before Lord Hardwicke, Ch. Hil. 1750. cited by Blackstone Justice, *ibid.* 1259.

There is one case indeed, where Courts of Equity are very cautious of deciding without the assistance of a jury; where the rights of the parties are to be bound by the decree; as in a suit between all the proper parties to *establish* a modus or other claim. But this bill is only for an account; the decree binds nothing. Courts of Equity are also more cautious of deciding on a question of tithes, where the claim might be established at law, as in predial tithes, which come only collaterally before a Court of Equity, for an account; than where the principal question is properly within their own jurisdiction, as the right to agistment-tithes; and this distinction is taken in all the cases. The commissioners having taken improper depositions, is a fact unknown to the court; they only know the evidence which could legally be read; and therefore cannot suppose that other evidence might be collected.

In the case of *Carr v. Henton*, there was very strong evidence on both sides, and the Court did direct an issue, though the bill was for an account only (the cross bill having been dismissed). There the decree in favour of the vicar was not followed by pernaney of tithes; and the impropiator shewed a subsequent judgment in the Ecclesiastical Court in his favour, which, although *coram non judice*, was sufficient to rebut the presumption arising from the other decree.

In *Keene v. Patrick*, the endowment being of *totum altaragium*, which can only be construed by usage, and there being no usage as to agistment-

tithe, the Court thought the vicar had raised no doubt in his favour : they did not direct an issue, but dismissed the bill.

In *Scott v. Airey*, actual pernancy for a very long space of time was proved in other persons. If that was tortious, a Court of Law was the place to determine the right ; and accordingly the bill was dismissed. The case of *Mawbey v. Edmead* was a bill to establish the right of one layman to tithes against another. The court refused to determine it, and dismissed it as a mere ejectment bill. *Edwards v. Lord Vernon* was dismissed on the same grounds.

In the present case there is no remedy at law ; we seek not to establish the right, and a decree does not bind ; there is no pernancy against us, and the whole evidence is so clearly for the vicar, that no serious doubt of his title can be entertained. No case can be shewn where in such circumstances a Court of Equity has held itself bound to direct an issue.

THOMSON, Baron.—Does it appear from the evidence that the rectory belongs to the prebendary ? He may be a mere portioner of tithes, and if so, the presumption in his favour, as rector, falls to the ground.

SUTTON.—That does not expressly appear from the evidence, but he is treated as rector both in the bill and answer.

MACDONALD, Chief Baron, this day delivered the opinion of the Court.

In this case the plaintiff, as vicar of *South Cave*, claims agistment-tithe. The defendant, considering himself as impropriator of the rectory, also claims it; and has insisted, that he is entitled to an issue to ascertain the right to this species of tithe, and more particularly to agistment-tithe of sheep depastured in the parish. To determine whether we have sufficient grounds for a decree, without sending the question to be tried at law, it will be necessary to consider the evidence that is before the Court. It is very clear, that a rector is *prima facie* entitled to the whole tithes; and the vicar can claim nothing unless he can shew an endowment, or some evidence from which an endowment must be inferred.

Here the defendant also proves an ancient payment to him and his predecessors of one penny for every sheep, and an halfpenny for every lamb, brought into the parish after Candlemas, and sold out before shearing-time; and insists on this as a perception of agistment-tithe. The vicar shews a common money-payment made to the vicars for the last forty years for turnips; five shillings *per* acre for turnips pulled, and two shillings *per* acre for turnips eaten off the ground; and insists that the latter is to be considered as perception of agistment-tithe in his predecessors.

But it is clear, that this payment to the vicar was not made under the idea of being an agistment-
Payment of a composition for the tithes of turnips, whether pulled or

eaten off the ground, where neither party considered it as an agistment tithe, is no evidence of perception of that species of tithe.

tithe. All the witnesses who speak of it, say, they know nothing of agistment-tithe, nor ever knew it paid; and *Robinson*, the former vicar, did not know of any such right: then this, which was not understood to be paid as agistment-tithe, cannot be considered as pernancy of that species of tithe, but merely as proceeding from a confused notion of the right of the clergyman to some satisfaction for the turnips, of which, if pulled up, he would have received the tithes.

A modus of one penny for every sheep, and an halfpenny for every lamb, brought into the parish after Candlemas; and sold out before shearing time, is a wool-modus, not an agistment-modus.

The ancient payment to the rector may be more naturally considered as a payment for the wool of the sheep and lambs sold out, than as an agistment-tithe. The halfpenny for lambs, in particular, can hardly be considered as such. The proper time to pay tithe of lambs, is when they can walk and feed. *Reynolds v. Vincent*, Bunb. 193. *Brinklow v. Edmonds*, Bunb. 308. It would be highly unjust, that lambs, when not eating, should pay half as much agistment-tithe as sheep; but the wool does bear that proportion: and in *Bishop Winchelsea's* Instructions, this very proportion is directed for the clergymen to observe in tithing wool. It is a common payment for the wool-tithe, but unknown as an agistment-modus. Every circumstance tends to prove that this is a composition for the wool on the backs of the sheep and lambs sold out of the parish; and it therefore appears that there is no evidence of pernancy of agistment-tithe on either side.

The vicar claims to be endowed of all small tithes, except wool and lamb. The first piece of

evidence in support of this claim, is the *extenta prebendæ*, the date of which must have been before the year 1312, as it mentions the Knights *Templars* as then in possession of lands in the parish.

It is material to observe, that in describing the claims of the prebendary in the parish of *South Cave*, the extent does not say, that the *rectory* belongs to him, but only the predial tithes; and in the next parish, it expressly mentions the rectory itself as a part of the prebend. This difference of language raises a great doubt, whether in fact the rectory of *South Cave* was annexed to the prebend.

In describing the rights of the vicar, it uses the general words *omnia minuta*; and it has been argued, that this cannot mean all small tithes, for then it should have been in the feminine gender; but can only refer to the other small dues of the vicar: this construction is negatived by what immediately follows, *injuste tamen detinentur decimæ de piscaria de A*. Although all small tithes belong to the vicar, yet this particular small tithe is unjustly withheld from him. Then the words *omnia minuta* must refer to small tithes as well as other dues.

This is strongly confirmed by the fact of the vicar's having constantly taken all new kinds of small tithes as they have been introduced into the parish. The progressive additions to their claims in the terriers, do away the idea of either the *extenta prebendæ* or the terriers being meant to enumerate all the articles to which the vicars had a right.

The parol evidence gives no light upon the subject, except in confirming the evidence of the terriers as to some undisputed facts: and as the *extenta prebendæ* and the terriers appear to us sufficiently to prove the nature of the endowment, it is not probable that any material parol evidence can be given. Thus, in the case of *Barkley v. Walters*, 1 Wils. 170. parol evidence of enjoyment for fifty years, contradictory to the written documents, was held merely to be an usurpation on the ancient right.

The defendant rests on his common-law right as rector, but has not made out his title to that character; it is doubtful whether he is not a mere portionist of certain small tithes, and certainly he has had no enjoyment of small tithes, except wool and lamb.

The *extenta prebendæ* does sufficiently prove the nature of the endowment, and is strongly confirmed by the terriers. As the whole turns upon written evidence, and the decree does not bind the right, we think, according to the determination of the case in *Wilson*, that an issue is unnecessary, and the decree ought to stand*.

* I have been favoured with the following notes of two of the cases relied on in the argument of *Garnons v. Barnard*.

BENNET v. READ and Others.

Serjeant's Inn
Hall.
17th July 1785.
A modus of
two-pence;
payable by
every house-
holder inha-
bitant in the
parish, for all
tithe of fuel, of

Bill by the rector of *Long Sutton* in *Lincolnshire*, who was also lessee of the vicar, against the defendants, occupiers of land in the parish, for an account of several species of tithes, particularly of agistment-tithe.

The defendants set up a modus in lieu of this and several other tithes. An issue was directed, and at the trial at *Lincoln*,

a verdict was found establishing a modus different from that laid. It was in these words: "That every person being an householder inhabitant within the said parish, and occupying a messuage, cottage, garden, orchard, yard, land, meadow, pasture, or marsh ground, within the same, has, from time whereof the memory of man runneth not to the contrary, paid and been used and accustomed, and of right ought to pay, to the vicar of the said parish for the time being, the sum of two pence at the feast of *Easter* or afterwards upon reasonable demand, by the name or names of *Hearth-silver*, *Garden-silver*, *Shot*, and *Waxen-silver*, in lieu and full satisfaction of all and singular the tithe of herbs, roots, flowers, apples, pears, nuts, and other fruits, in or upon any garden, orchard, or yard occupied by such person within the said parish, yearly growing, arising, and renewing, and of all wood, cuttings, toppings, and croppings of trees cut in such year, upon land occupied by such person within the said parish, and of all herbage and agistment of barren and unprofitable cattle, kept, fed, and depastured by such person, in the said parish, or the titheable places thereof, in such year; which said sum of two pence hath been, during all the time aforesaid, accepted by the vicar of the said parish, for the time being in lieu and full satisfaction of the tithes aforesaid."

Another modus was also set up and found by the jury, "That every person, resident and occupying lands within the said parish, and having sheep fed and depastured there, shorn within the said parish in any year, and sold and sent out of the said parish after the 13th day of *February*, commonly called *Old Candlemas day*, in the next year, and before the next shearing time, or which have been bred in the same parish, or brought into the parish after the shearing time in any year, and sold or sent out of the said parish, after the 13th *February* next following, and before the next shearing time, hath paid, and for all the time aforesaid been accustomed to pay, and of right ought to pay, to the vicar for the time being, the sum of three pence for every such sheep, in lieu and full satisfaction and discharge of the tithes due and payable to such vicar for such sheep, &c."

Another modus of three-pence for all sheep carried out of the parish between *Candlemas* and shearing time, covering the same place and persons, does not contradict the former modus for agistment, but is only to be taken as limiting it in the extent covered by the latter.

The defendants insisted, and it appeared to be true, that the

parish had been recovered from the sea, being still mostly marsh land.

Pryce, Mansfield, Newnham, and Ainge, for the plaintiff, objected to these moduses on several grounds. The first modus covers different species of tithes the most dissimilar to one another, some being great tithes, others small, and the waxen-silver evidently relating to the altar dues; the former, the wood, is a tithe payable to the rector, the others to the vicar; the former are enjoyed under the common-law right, the latter under the endowment. The payment being entire, cannot now be apportioned; yet it is clear from the names, that they had formerly been distinct payments: then the names contradict the modus as an immemorial entire payment.

This modus is also unreasonable and unjust, in that it comprehends things which the person paying the modus may not have, as for the produce of a garden, when he has none; and one who has a yard, pays the same as if he had an orchard and 500 acres of land. This was admitted to be a valid objection, *Anon.* 1 Vent. 3. If the occupiers reside at a distance from the parish, nothing is payable under the modus; but the vicar must have a certainty of the continuance of the payment, or it is bad. *Lady Gresham's* case cited Cro. Eliz. 139. *Carleton v. Brightwell*, 2 P. Wms. 462. If the inhabitants are reduced to ten, the whole parish will be covered by a modus of twenty pence. *Travis v. Oxtan* is a case in point to shew that such uncertainty vitiates the modus. A modus should be such as may have arisen from a reasonable agreement at first; but this is unreasonable on both parties. It is unreasonable that a cottager should pay the same for his cottage which was a fair agreement for the largest farm. To the vicar, it is unreasonable that his payment should be uncertain. It should have been a certain payment annexed to a certain quantity of land.

The two moduses contradict and invalidate one another: the first is a modus for all unprofitable cattle, including, therefore sheep during that period of the year when they are unprofitable; the other modus is a different payment for the same thing; for the sheep would otherwise pay agistment-tithe during that time; and the modus is therefore an agistment-modus as well as the other, covering part of the same article.

Jackson, Burton, and Mitford, on the other side.—The pay-

ment in lieu of tithes ought to be as certain as the tithes themselves, but not more so. *Startup v. Dodderidge*, Salk. 657. *Hardcastle v. Smithson*, 3 Atk. 246. The orchard may be rooted up, and the houses fall to ruin; the modus will then be lost, but so would the tithes of three out of the four articles included in the modus. If a man resides out of the parish, he pays tithe in kind. This was a necessary encouragement to residence, when the parish was lately recovered from the sea; and a particular local reason will make that good which might otherwise be held a bad prescription. *Weekly v. Wildman*, 1 Lord Raym. 405.

Here something must be paid, and that is all that is required by the law as to the certainty of a modus. A prescription for a lord of a manor to keep up a bridge, in respect of a toll, or to keep a bull or a boar, is good; each party calculates upon an average probable profit; yet the bridge may be disused by all but one or two, and so the toll become of no value. The parish may get into a practice of buying young stock instead of rearing, and so the bull or boar be a loss to the owner; but the probability was otherwise. So here, there is an encouragement to residence by the modus; the probability is, therefore, that the number of inhabitants will increase; yet they may be diminished. The same objection was taken in the case of *Chapman v. Monson*, 2 P. Wms. 565, and over-ruled.

There is a difference between a prescription and a custom. The former must be conformable to the general law; the latter is a substitution of a particular local law, for the general, and will be supported from its antiquity alone, as *Gavel kind*, *Borough English*, &c. So in tithes, many regulations are good by way of custom, which would not be good as a prescription; as to take tithe of fish, or of animals *feræ naturæ*. A general rule of tithing, attaching upon a district, and not upon particular pieces of lands, is a custom, not a prescription.

The second modus evidently arises from the old ecclesiastical rule with respect to the mode of tithing sheep. The only tithes understood to be due, were wool and lamb. If sheep were removed from one parish to another between the times when those tithes arose, the clergyman of the one parish paid a certain proportion of the wool to the clergyman of the other, or money in lieu of it; or the parishioners might make a recompence for the wool lost by the removal. This modus is evidently of the

latter description, and was not considered as an agistment-modus at all. Both the moduses may therefore have had a reasonable beginning, because they were then understood to cover different things, although it is now known, that the language in which the first is found would cover both. If the whole is covered by the first modus, and the second is therefore superfluous, it may be rejected; it cannot invalidate it.

The judgment of the Court was this day delivered by EYRE, Baron, in the absence of Lord Chief Baron SKINNER.

It has been urged as an objection in point of law to this modus, that it is one entire payment for distinct species of tithes of different natures, without ascertaining how much is due for each; and the payment, in fact, admitting of no integral division or apportionment. In truth, it is an aggregate sum made up of several distinct payments marked by different names, distinguishing the different purposes to which each was originally applicable. They object further, that it is unreasonable, being unequal and uncertain in point of provision for the vicar, and that, as applied to land, it is floating and shifting, and covering an uncertain quantity of land, and depending upon the accident of the inhabitants occupying more or less; whereas it is said, that where a modus is pleaded to cover land, the land ought to be specifically set forth.

The argument in support of the first objection, rested altogether upon the reason of the thing; no authority was cited in support of it. It must be admitted, that there is reason to imagine that the *hearth silver* and *garden silver*, which are known and familiar denominations of moduses, are for the tenth of the fuel and wood spent in the houses of the inhabitants, and for the tithes of the gardens and orchards, were applicable to those demands only. Shot, and waxen-silver, are terms less in use; however, their true import must have been distinct from the two former. Whether the payment now insisted upon of one sum of two pence, is capable of an integral division and apportionment to the several species of tithes covered by it, will depend upon the matter of fact, whether these species of tithes were three or four in number, considering fuel and wood, in general, as two. It is in fact at this day applied to four; *i. e.* fuel, garden, wood, and agistment, and in that case it will admit of an integral division and apportionment. Supposing the payment of two pence to be capable of a strict apportionment, it will follow, that

four distinct payments have been combined into an aggregate sum.

Suppose it not to be capable of such an apportionment, it must then be concluded, that the distinct payments were some time or other compounded for by a gross sum. The only thing for us to consider in this payment is, whether the combination or composition took place before the time of memory. If it did, it is just as binding as the separate payments would have been. If it took place since the time of memory, it would be in the nature of a temporary composition, which being determined either by the vicar or the inhabitant householders, the several distinct payments would be revived. If this is to be the clear result of our deliberations, and of all the inquiry into this payment, it is hardly worth the pains and expence that have been bestowed upon it. This inquiry might have been stopped *in limine*, by observing that it went to matter of fact and not of law, and that the fact is concluded by the admission that this has been an immemorial payment.

Taking it then as an immemorial payment in satisfaction of the tithes to which it has been in fact applied, what is the distinct objection to it in point of law?

Can it be objected, that there can be no valid composition for several distinct species of tithes by one entire payment? Or can it be objected, that this payment may not be called or known, or distinguished, by any denomination which the parties think fit to annex to it? All the tithes of the parish, the district, the farm, the messuage, or the garden, may be satisfied by a modus consisting of one entire sum, greater or smaller. So may part of these tithes; the great tithes, or part of the great tithes; the small tithes, or part of the small tithes. Why not some great and some small tithes? As to the denomination, it is enough to say, it is perfectly arbitrary. Upon the whole, therefore, we are perfectly satisfied that this modus is not to be impeached upon this head of objection.

The next objection taken to this modus is, that it is unreasonable, being, as it is alledged, unequal and uncertain in point of provision for the vicar, and uncertain in another respect, as extending to cover the tithes of an indefinite quantity of

land, whereas land covered by a modus ought to be specifically marked.

It is no objection that it falls unequally on the parishioners by being as heavy on the occupiers of small as of large tenelements and farms.

There certainly is this inequality in this modus, that a mere inhabitant householder without a foot of land, pays as much as the inhabitant householder who occupies the largest farm in the parish. And there is this appearance of its being unreasonable, that the mere inhabitant householder seems to pay for tithes where he has not all the titheable matters for which he pays a satisfaction : but it is rather for the parishioner than for the vicar to state these objections. However from whatever quarter they come, they certainly prove too much. There can be no modus, by a money payment, to which these objections will not in some degree apply ; as in the most familiar instance, and that which makes part of the present case, the hearth-money and the garden-money ; one hearth or garden pays equal with another, and the cottager pays the same sum which is a satisfaction for the whole produce of his opulent neighbour's extensive kitchen garden. If the necessary consequence of this kind of modus was to be an objection to the validity of it, there could be no such modus.

In truth, there is nothing in these objections ; the inhabitant householders have entered into a composition for their tithes, by a money-payment rated upon them. In the case of inhabitant householders, they are all capable of taking the benefit of it. Lord *Hardwicke* answered a similar objection to a hay modus in *Hardcastle v. Smithson*, by saying, that they may all have hay if they please. The modus has this degree of equality, that no one can prescribe, or can set up any exclusive claim to cover more titheable matters than another ; and the main end and purpose of these compositions is, to avoid all reference to the quantity of titheable matters which are actually produced.

The inhabitants of a village are perpetual in contemplation of law ; and usages, which are perpetual in their nature, may therefore attach upon them.

The objections which seem immediately to concern the interest of the vicar deserve more attention ; if the modus is uncertain in point of provision for him, if it shifts and fluctuates so as to hazard that provision, it ought not to be established. It is said to be uncertain, because the number of the inhabitant householders may be reduced ; in consequence of which, the composition of the vicar will be lost. Undoubtedly, if the number of houses is reduced, and the reduced number occupy as much wood-land, and agist as many unprofitable cattle, as the original number did, the vicar would sustain

a loss: upon the other hand, he certainly gains by any increase of the number of houses; and it may happen that he may not lose by the reduction; for if the land occupied with decayed houses falls into the denomination of land occupied by *out-towners*, he would receive tithes in kind of those: and the consequence of that is, the decay of the houses will operate as a benefit to him instead of a prejudice. The vicar seems therefore to have the advantage from the speculation of this increasive and decreasive number of houses. But the answer given at the bar to this objection is the true one; the recompence is certain to a common and reasonable intent, and more is not required. My Lord *Hardwick*'s words in *Hardcastle v. Smithson*, where he treats of this doctrine of the certainty or probability of the reduction of inhabitant householders, were, that it is too remote a consideration. Two houses, in particular, may decay, and may not be rebuilt, and the *modus* depending on the existence of two such houses, may be objected to for want of certainty of duration, which occurred in the case *Cro. El. 139*. But the inhabitant householders of a town or vill are perpetual in consideration of law, and customs and usages which are perpetual in their nature, attach upon them.

The question, as to the quantity of land covered by this *modus* being shifing and desultory, and the application of the case of *Travis v. Oxton*, the last authority upon that subject, the case now before the Court, are the main points of the cause, and upon which our opinion has been some time suspended.

A prescription that *A. B.* and all those whose estate he held in particular lands time out of mind, paid so much, in satisfaction of such and such tithes arising upon those specific lands, is what in the old books is expressed by the term, prescribing in a *que estate*; the plain English of which is, the right or privilege claimed by prescription, as annexed to particular lands.

A *modus* covering a parish or district, is rather a custom than a prescription, and may often be good where a prescriptive *modus* covering particular lands would be bad.

This suggests a satisfactory reason for insisting upon the certainty of the land in that kind of *modus* which is prescriptive. Such a prescription can no more exist without a certainty in the lands to which it is annexed, than a shadow without a substance.

There was an observation suggested at the bar, that there was a difference between a *modus* strictly prescriptive, and those established by the custom of the place, which will be found to have

a material application. There is clearly this difference between a prescriptive and a customary modus, that this last is not annexed to the lands which it covers; it exists in a notion of law independent of the lands, by force of the custom prevailing in a particular district; such a custom is as necessarily attached to the certainty of district, as the prescription is to a certainty of the particular lands. In pleading, it would be said there was a certain usage, or custom used time out of mind, &c.

There are many other points in which certainty is necessary to support a custom, that is, to make it appear sensible and not unreasonable. In the case of a customary modus, and of this in particular, which purporting to give a common right to all inhabitant householders of this parish, is undoubtedly a customary and not a prescriptive modus; in these, certainty of the thing for which the recompence is given, and also certainty of the recompence itself, are necessary. Now here there is a fixed and certain recompence; for we have held this payment of two pence under the name of hearth-silver, &c. by every inhabitant householder to be fixed and certain payment. There is therefore a fixed and certain recompence for all the tithes of a particular species due from all the inhabitant householders within the district. It is true, the two pence paid by the individual inhabitant householder is not a satisfaction for tithes of specific land, as in the cases of a farm modus, which is of a fixed quantity; nor does the interest of the vicar require it should. It is indifferent to the vicar whether any inhabitant householder occupies the same land this year as the preceding year, whether more or less; because his recompence for the tithes of the whole land occupied by persons of that description, is known and fixed by a reference to something else which is, to a common intent, certain. It is by reference to the number of inhabitant householders that the recompence is precisely the same, whether the individual who pays it occupies more or less.

There is one certainty which remains, and that is the quantity of the whole land occupied by the whole body of the inhabitant householders: it may be more or less in different years, and even in the same year; and in this respect, this modus may be still said to be shifting and desultory. We shall be driven to cut this knot, instead of pretending to untie it. It must be taken to be an answer to this objection, that all the cases in which a different rule has been established between the out-towners and the in-

towners, between residents and non-residents, are liable to the same objection; and it is now too late to shake the authority of these cases. Thus much only I will say upon it, it imposes no real hardship upon the vicar; the occupation of land is of public notoriety, it must be known to the vicar. The fluctuation is properly reciprocal, and he gains in one way what he loses in another.

The application of the case of *Travis v. Oxton* remains to be considered. In that case there was a tilt-penny from persons occupying houses with lands, in satisfaction of the tithe of hay. It was held to be a bad modus. I think it was rightly so held, for reasons which I shall not now repeat. It is not necessary to go into that case at large, because there is this clear line of distinction appearing upon the general statement of the two cases; in *Travis v. Oxton* the recompence is confined to houses having shifting land; consequently, if the land was shifted and annexed to another house and other land, the first house paid none, and the lands or house to which they were added, paid no more, and the recompence to the vicar was so little fixed, that it might be reduced to a single tithe-penny.

In this case, let the occupation vary as it may, the recompence remains the same; it is no part of our consideration whether there is a deficiency in value; that was the care of the original contractors; we are only to say that the contract is sufficiently precise and certain, that the parties may have the benefit of it, such as it is, at all times. The result of our examination of the modus in question is, that in point of law it is a good and valid modus.

It has been argued that the second modus is inconsistent with this, which they allege to be in full satisfaction of all tithes of agistment and herbage of barren and unprofitable cattle, and that it consequently included sheep. The objection is palpable, but this is not the time for taking it; it goes to prove that both these moduses cannot in fact exist together without some explanation, but it does not prove that either is bad in point of law: in fact, if they were, it was before the jury that the objection was proper to be taken; they might be, very probably, made consistent merely by the form of negativing a more general modus, and then indorsing upon the postea the very same modus, with the exception only of the sheep, which fall under the particular modus.

The fact of these moduses being admitted in this case, and they being so easily reconciled and both taken together, amounts to a good defence against the whole demand made by this bill, of tithes in kind; it follows that this bill, so far as it seeks an account of tithes of agistment, should be dismissed with costs. But the defendants having insisted upon several moduses set forth in the pleadings, in lieu of such tithes of agistment, and the fact of such modus having been admitted by the plaintiff, and the same appearing to the Court to be good and valid moduses, it must be referred to the Deputy Remembrancer to take an account upon the foot of each modus.

ELLIS v. SAUL and Others.

In the
Exchequer,
Hil. Term 1790.

Bill by the plaintiff, vicar of *Sibsey*, in the county of *Lincoln*, against the occupiers of land in the parish, for an account of the tithe of agistment of all horses, cows, oxen, sheep, lambs, and other cattle fed and depastured on lands within the parish of *Sibsey*, or the titheable places thereof, in their occupation respectively, or upon any commons or fens within or adjoining or near to the said parish. The plaintiff, without relying upon any particular endowment or other instruments, states, by way of title, that he is, by virtue of certain ancient endowments and otherwise, entitled to receive all or the greater part of the small tithes, &c. particularly the agistment-tithe. To this bill the defendants, the occupiers, in their answer, set up three defences negating the vicar's claim to the tithe of agistment, or to any compensation in lieu thereof; first, they say that by ancient custom, used within the said parish from time whereof the memory of man is not to the contrary, there were and are due and payable, and ought to be rendered and paid to and accepted by the rector of the said rectory, yearly and every year upon the 22d of November, commonly called old *Martinmas-day*, three ancient moduses or customary payments, namely, *an ancient modus, or customary payment of one penny per acre, in lieu of the tithes of all grass growing every year upon all the lands within a certain district or part of the said parish called the moors, lying on the east side of Wardike drain, whether such grass be mown for hay or be eaten by the mouths of barren and unprofitable cattle*; and they set up another payment of two pence per acre for another description of lands in the same manner; and also an ancient modus or payment of three pence per acre, in lieu of all the tithes of like grass, whether mown for hay or eaten by the mouths of barren and unprofitable

cattle, growing yearly upon the grass lands within the said parish, and the titheable places thereof, not comprized within either of the above mentioned districts, (except the village or hamlet called the *Fryth Bank*, the tithes whereof are not due or payable either to the rector or vicar of the said parish of *Sibsey*, as the defendants apprehend, the same having been constantly paid to Lord *Monson*, or his lessees, &c.) ; and they say that the said three districts comprize all the lands lying within the said parish of *Sibsey* except the *Fryth Bank* and the arable lands ; that the plaintiff, as vicar or otherwise, is not entitled to the tithe of agistment of any sheep fed within the said parish, as claimed by the said bill, because there are not, nor hath there been, any barren and unprofitable sheep fed within the said parish during the time mentioned in the said bill, but on the contrary, all the sheep fed and depastured as aforesaid, have in fact yielded, according to certain ancient and immemorial customs and usages within the said parish, tithe in kind of wool and lamb, or some modus in lieu thereof, to the rector of the said parish for the time being, in manner following, (*i. e.*) *tithe*, in kind, of wool, for sheep brought into the said parish before *Candlemas day* in any year and clipt therein ; and an ancient payment of *one penny per head for every sheep brought into the said parish after Candlemas-day in any year, commonly called new sheep, and clipt therein, in lieu of the tithe of wool of such sheep* ; and also another ancient payment of *three pence per head for every sheep which shall have been in the said parish before the 13th of February commonly called old Candlemas day, in any year, whether bred or shorn in the said parish in the preceding year, or brought into the said parish a short time before the said 13th of February, in any year, and carried out of the said parish before the succeeding shearing day with the wool upon its back, as an average rate or payment in lieu of the tithe of wool carried out upon the backs of all sheep removed out of the said parish after any one shear day, and before the shear day in the succeeding year* ; and therefore that the vicar is not entitled, &c. ; but if the Court should be of opinion that the plaintiff is entitled, then the defendants insist that he is not, to the extent claimed by his bill, because they submit that tithes of agistment of barren cattle fed on lands which have been mowed for hay, and have paid tithe of hay, or a modus in lieu thereof, in the same year, are not due, of common right, to the vicar : they insist that no tithe of agistment, or modus in lieu thereof, has ever been paid to the plaintiff, or any preceding vicar of the said parish, for

barren cattle kept, fed, and depastured upon certain commons and fens called the *East and West Fen*; and they submit, that no tithe of agistment is of common right due or payable to the vicar aforesaid for barren and unprofitable cattle kept, fed, and depastured upon the said common or fen, the same, or any part thereof, as defendants believe, not lying within the said parish of *Sibsey*, or the titheable places thereof; that no modus or composition hath ever been paid to the vicar of the said parish for the time being, in lieu of the tithes of agistment of barren and unprofitable cattle fed on lands within the said parish, or the titheable places thereof.

The defendant *Gapr*, the improper rector, (who was by the order of the Court made a defendant,) by his answer, admitted the vicar's claim to all small tithes, &c. except such as were due and payable to the rector, and submitted to the Court, whether the plaintiff was entitled to the tithe of agistment. He admitted to have received the several payments of one penny, two pence, and three pence, and also the sheep payment, and stated that, according to his information and belief, the same had been immemorially made, and were moduses in lieu of such tithes as in the answer of the other defendants were set forth.

It appeared that the tithes of this parish originally belonged to the prior of *Spalding* as impropriator.

The evidence on the part of the plaintiff, the vicar, consisted of an endowment dated in 1363, &c. and a terrier of 1707.

In the endowment (which was taken from an ancient book of institutions in the time of bishop *Buckingham*, who began to preside over the see of *Lincoln* in 1363, which book is remaining in the registry of the see of *Lincoln* at *Lincoln*,) which purported to be an endowment of the said vicarage, there is this clause: "*Percipiet insup. vicarius dicti loci qui pro tempore erit a religiosis prædictis annis singulis omnia quæ sequentur, viz. melioris fermenti, viginti quarteria hordei, vel consimilis, quatuor quarteria avenar & quatuor caricatus feni, sex caricatus straminis quæ omnia percipiet ad festa Omn. Stor & Item percipiet omnia mortuaria, &c. Item percipiet dictus vicarius decimas lactis & omnesq; minutas decimas exceptis decimis anserum, porcellorum, agnorum, & Lanæ, quas decimas dictos religio- osos volumus, &c.*"

In the terrier (which was extracted from the registry of the Lord Bishop of *Lincoln*, and is intitled, "A true and perfect terrier of all the glebe lands and dues belonging to the vicarage of *Sibsey*, in the parts and county aforesaid, drawn according to the directions sent by the Right Reverend Father in God *William* Lord Bishop of *Lincoln*, October 8th, 1707," and signed by the vicar, churchwarden, and six other persons,) there is this clause: "Item, it is a vicarage endowed, in lieu of tithe corn, hay, wool, lamb, pig, and geese, (as may, by the original endowment now in the registry at *Lincoln*, appear) with twenty scame of barley, thirteen scame of wheat, four scame of oats, four loads of hay, and six loads of straw, all which are paid unto the vicar upon *All Saints day* and *Good Friday*, by equal portions; and upon *St. Martin's day*, for every milch cow four pence, for every calf one penny, for every fowl one penny, and for hemp, flax, cole, rape, chickens, ducks, turkies, and all other small tithes, (excepting in the *Fryth Bank*, which pays no manner of tithes to the vicar, the same being paid to *William Monson Esq.*) in kind."

The plaintiff's counsel also read parol evidence, taken by cross examination of the defendants' witnesses, to prove that the witnesses had not heard of any such thing as agistment-tithe till the present suit was instituted, and did not know the meaning of the word agistment; and also to prove, by one of the witnesses, that the penny, two penny, and three penny payments were for cut of grass, and that that part of the lands to which the two penny payment was applicable was Lammas land, and that none had right of common there but persons resident in commonable houses, but that outners had rented this land and made the payment to the rector. They also proved that tithes had been paid for lambs dropt upon the *East* and *West Fen*, and for wool shorn from sheep depastured on those fens, to the rector.

The proof in the cause for the defendants, the occupiers, consisted intirely of parol evidence of the fact of the payments having been made to the rector in such manner and in lieu of such tithes as alledged in their answer, and that the same had been invariable, and, by the reputation of the parish, immemorial; they also proved the *East* and *West Fen* not to be within the parish of *Sibsey*, (although the parishioners had a right of common there,) but they did not know within what parish the same were situate.

Partridge and Harvey, for the plaintiff, stated the vicar's title to the agistment-tithe to be founded in the endowment, which, under the general words *omnes minutas decimas*, endowed him with the agistment-tithe; and that this title was the stronger and more indisputable, by reason of the exceptions contained in the instrument, that that exception was tantamount to express words; and that the same observation applied also to the terrier.

With respect to the penny, two-penny, and three-penny payments, they contended that there was a general objection went to the whole, namely, that the payments were to the wrong person, the rector and not the vicar; secondly, that the defence was not sufficiently technical, and did not apply to every species of agistment-tithe; for instance, there might be turnips or cole cultivated on some of those lands, and afterwards eat off by barren cattle, in respect of which agistment-tithe would be due, and the payments did not apply to this case.

They also argued, that part of the lands being Lammas lands, and sometimes occupied by outners who were not entitled to a right of common there, and therefore could not occupy the same during part of the year, it was unreasonable to suppose that such outners could pay the two pence in lieu of the tithes alluded to in the answer.

As to the average payment for sheep, they insisted that such payments were inconsistent, as *moduses*, with the other *moduses*, for that there could not be a general *modus* extending to all barren cattle, and a particular *modus* applicable only to one species, namely, sheep; and therefore the payments were inconsistent and bad: they also insisted that the sheep payments did not meet the vicar's claim, as they are said to be in lieu of the tithe of wool and not of agistment; and in that respect also they were bad and absurd, as there is no tithe of wool due or payable till severance.

They abandoned the claim to agistment for after-pasture.

As to the agistment-tithe for the *East and West Fen*, they insisted that the plaintiff was entitled to it under the statute of 2 and 3 Ed. VI. c. 13. whereby it is enacted, "That all and every
" person which hath or shall have any beasts or other cattle
" titheable, going, feeding, or depasturing in any waste or com-

“mon ground whereof the parish is not certainly known, shall pay their *tithes for the increase of the said cattle* so going in the said waste or common to the parson, &c. of the parish where the owner of the cattle dwelleth;” and they argued that tithe of agistment is the tithe of the animal and not of the land, and that appears from its being due only in respect of certain animals, namely, barren cattle; that the *increase* meant the improvement; that if tithe of agistment were due merely for the eatage of grass, such tithe would be due for animals *feræ naturæ*; that agistment tithe, in Burn, is said to be the feeding of cattle upon pasture lands, which cattle pay no other tithes, and therefore the animal only is the thing considered: they cited *Sherrington v. Fleetwood*, Cro. Eliz. 475. and Saville, 60.

Newnham, Burton, Topham, and Sutton, for the defendants, insisted; first, that the payments in lieu of the wool and agistment for sheep, were unimpeached by any legal objection; that in consequence of those payments, there were no sheep in the parish unproductive of tithe, or a compensation for tithe; and therefore no agistment-tithe could be due; which tithe is payable only in respect of barren cattle.

The objection to this particular modus, as being inconsistent with the general modus before set up, might easily be reconciled by an exception in the general modus; and this is no objection in point of law; the same was done in the case of *Bennet v. Read*. It must be admitted, that those payments do not apply to every case of sheep removed out of the parish, as there is the period of time between sheer-day and the end of the year unprovided for; but the payments clearly proved, from the nature of them, that the parties to this contract had in contemplation the agistment of sheep; and the Court would not require that the contract should provide for every possible case. But if it be a reasonable average payment, and proved to have been invariably and immemorially paid and received, it is sufficient. *Bennet v. Read* is in point also to this part of the argument.

They also argued, that sheep could not be liable to agistment-tithe, in any case; for that they were useful by manuring, as cattle of the plough were by cultivating the land: and it is laid down by Lord Coke that tithe-agistment is not due for cattle yielding profit or manure.

EYRE, Chief Baron.—That depends upon the fact. If a flock were kept for the mere purpose of folding upon the land, they might be exempt from tithe of agistment.

It was objected by the Court, that the manner of laying the three-penny payment for sheep brought into the said parish *a short time before the said 13th February*, was extremely vague and uncertain. In answer to which it was said, that those words were superfluous and might be expunged.

They then argued, that if the average payments for sheep were bad, still there were the other moduses, which were sufficient to negative the parson's claim. Three objections had been made to these moduses: first, that the payments were to the wrong person, the rector, and not to the vicar. Secondly, that the defence was insufficient, in not using the technical word *agistment*, and not being sufficiently extensive to apply to cole or turnip. Thirdly, the objection to part of the lands being Lammas lands, &c.

As to the first, they answered, that the payments were stated to be immemorial, and must therefore have originated in a contract with the rector, to whom all the tithes in the parish originally, and before the endowment, of right belonged. To the second objection they answered, that there is no principle or case which establishes, that a set of formal words must be used to negative the parson's claim; but it is sufficient if a good legal compensation be insisted upon, and proved to have been immemorially made in lieu of the tithe claimed by the plaintiff's bill. And as to the objection, that this defence does not apply to the case of cole and turnip being cultivated and fed off, if that were a fact in this case, it might raise an argument, but there was no proof of any such titheable matter; nor did the objection affect the legality of the modus, but could only tend to limit and restrain the extent of it. It might be argued possibly, that these payments of one penny, two pence, and three pence, were only average payments for hay, taking the chance of the lands being cropped for hay or not: but this would be unreasonable, as in that case the defendants might be liable to a double tithe; namely, the payment of these moduses, and also for agistment-tithe of the same land in the same year. And further, these payments were at so much per acre, varying according to the quantity, and were proved by the whole evidence to have been made in lieu of the eatage as well as the hay.

As to the words used in the endowment giving all the small tithes under the general terms *omnes minutas decimas*, first, there has been no possession under it; and therefore, like any other old instrument, where there has been no consistent possession, it is not evidence of title; and the presumption from the want of possession is, that the ordinary, who had always a power of abridging the endowment, might in this instance, by a subsequent instrument, have diminished or reduced it.

EYRE, Chief Baron, doubted whether there was any instance of an instrument to reduce or abridge the tithes granted by an endowment.

Burton admitted that it was no where laid down in terms, that a bishop or ordinary has authority to diminish, though he may extend or dissolve an endowment; but it may be done by amicable arbitration or judicial decision, as by the bishop or proper officer under him in a judicial proceeding, or by an instrument amicably adjusting and deciding the rights. There is a case of that sort between the Nuns of *Langeley* and the Vicar of *Sumeredby*. See Madocks's Formulary 88.

They contended also, that if the moduses insisted upon had existed immemorially, the endowment in this case, which was merely an agreement between the rector and vicar, and to which the land-owners were not parties, could not affect their rights, and cited to this effect *Fox v. Ayde*, 2 P. Wms. 520. *Grene v. Austin*, Yelv. 86. General words in any instrument like ambiguous words, are capable of being expounded by custom and usage. 2 Roll. Abr. 335. plac. 8. *Attorney General v. Parker*, 1 Vez. 43.

As to the third question, whether the vicar is entitled to agistment of barren cattle depasturing upon the *East* and *West Fen*? they contended, that as those fens were not within the parish of *Sibsey*, the vicar's title must rest upon the statute of 2 & 3 Ed. VI. c. 13, and that neither the words nor the intent of the statute apply to agistment-tithe. The words are, "all persons that have beasts or other *cattle titheable*;" and it is a clear principle, that agistment-tithe is not due for cattle that are titheable, but for barren cattle. Agistment-tithe is, from the definition of it, the tithe of the land; for it is the tithe of the herbage

eaten by the mouths of barren cattle; and it is not due for after pasture, because the tithe of hay has been once paid, and the same land shall not in one year pay double tithe; but if it were the tithe of the cattle, that reason would not apply. That that is the reason why agistment is not payable for after-pasture, appears from *Greene v. Austin*, Yelv. 86. 2 Inst. 651-2. 2 Salk. 655.

By the words of the statute, this tithe is payable for the increase of cattle, whereas the tithe of agistment is payable whether the cattle increase and improve, or become lean and impoverished; or if they die it will be payable to the time of their death: so that the words of the statute do not apply or extend to the case of agistment-tithe.

Secondly, the intent and object of this statute do not apply. This statute, from the preamble, appears to have been framed for the purpose of protecting the parson from the frauds that might be practised upon him, and the losses he was subject to from the difficulty in ascertaining the tithe due and payable to him. The tithes of the young are due when they are dropped, of milk and wool where they are taken from the animal; so that it was extremely easy for the occupiers, having a right of common upon land out of the parish, to defraud the parson by removing their cattle at the time they were about to produce such tithes; and it was a great hardship that the tithes of those animals which had been supported on lands within the parish during a great part of the year, and which being *animalia fructuosa*, were not liable to agistment-tithes, should avoid the parson's tithe by such means: to obviate which, and to remedy that mischief, this statute passed. But this reason does not apply to agistment-tithe, which is the tithe of the land. So long as barren cattle, in respect of the eatage of which agistment-tithe is due, are kept and depastured upon lands within the parish, the tithe is payable; on their removal, their place in the parish will be supplied; there can be no fraud in removing them, and the parson can lose nothing and sustain no prejudice by their removal; and therefore the statute could not mean to protect him against it.

EVRE, Chief Baron.—This is a bill brought by the vicar for agistment-tithe, for barren cattle fed and depastured upon lands

within and adjoining to the parish. His title to agistment-tithe within the parish is founded on an endowment of all small tithes, drawn up in a form which shewed an intent to comprehend all not particularly excepted. This is a good *prima facie* title; the defendants avoid the claim in different ways; they say, as to the places within the parish, that it is divided into distinct districts, and that there are certain ancient payments or moduses payable for agistment-tithe generally applicable respectively to each of them; they also insist on certain payments in lieu of the agistment of sheep.

To begin with the sheep moduses: the vicar's counsel have mistaken the defence, which amounts to this, that there are no sheep within this parish in respect of which some payment is not made, *i. e.* there are no unprofitable sheep. As to the fact of these payments, no witnesses are called to disprove their existence; but the plaintiff says, that this is only a wool-tithe, and not good because no tithe for wool is due before severance. True; but I do not know why a customary payment antecedent to the tithe being due, may not be a good custom: thus, a payment in *March* instead of clipping time; and if so, I do not think this necessarily a tithe of agistment and not of wool. By the canon law, the tithe of wool upon sheep removed from one parish to another, was apportioned between the clergy of the different parishes. We do not adopt the canon law, but allow a tithe of agistment for sheep removed out of the parish: nevertheless, where the canon law is founded in great equity, I do not see why a custom similar to it is not good. As to the objection to the time being indefinite, those words may be expunged: and upon the whole I think these moduses good in point of law.

As to the other moduses, there is no objection to the manner of pleading them; but it is objected, that they are not sufficiently proved, and if they were, still that they are no bar to the vicar. As to the fact of their existence, there is great looseness and uncertainty in the evidence; the witnesses do not know what is meant by agistment; on the other hand, the fact of payment is clear, and also the fact of no claim having been ever made before the present suit; and undoubtedly it is not fit that we in this stage should decide upon it; therefore if an issue is prayed, the vicar is clearly entitled to it.

A customary mode of tithing sheep; paying one penny per head for sheep brought into the parish after Candlemas and clip in the parish, in lieu of tithe of wool; three pence per head for sheep in the parish before Candlemas and carried out before shearing time, as an average payment for the wool carried out, will be good; the latter payment may be applicable to the wool-tithe, though not then due.

Unnecessary words used in the laying a modus, which would make it indefinite, may be expunged.

A modus for agistment-tithe paid to the rector, is a bar to the demand of that tithe by the vicar, although by the endowment he has all the small tithes. Agistment-tithe is the tithe of the herbage eaten by cattle not titheable; it is not tithe of the improvement of the cattle.

When grass has been cut for hay, no tithe is due for the after pasture.

Agistment-tithe is not within the 2 and 3 Ed. VI. c. 13. s. 3.

But the vicar says, that he is not barred by these payments, and that his title is under the endowment of all the small tithes. He can only be entitled to what the rector had a power to give; and the cases cited by the defendant's counsel upon this point are decisive. Therefore if these payments have existed immemorially, and in lieu of the tithes of agistment as well as hay, the vicar has no right.

As to the claim of agistment-tithe for the cattle fed upon the commons out of the parish, I am clearly of opinion, that tithe of agistment is not within the meaning of the statute of Ed. VI. Agistment-tithe is the tithe of the herbage, not of the cattle; and it may be defined to be paid in respect of the *herbage of cattle not titheable*, with as much propriety as of barren cattle. That it is not the tithe of the improvement of the cattle, is clear from the observation, that no tithe-agistment is due for cattle fed on oil cakes, &c. and the case of no tithe of agistment being due for after-pasture, is decisive as to the nature of the tithe.

What was the intent of this statute? It was to remedy the numerous frauds which might be practised, and to prevent the losses which might be sustained by the parson from the difficulty and almost impossibility of ascertaining where the tithes of the cattle were due. It would be impossible to know, on an extensive wild common like this fen, where the young were dropped, &c. To remove this difficulty, and prevent frauds, the statute passed; but the reason does not apply to the tithe of the produce of the soil. Whenever that question became important, the remedy was obvious, by taking the boundaries.

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PRINCIPAL MATTERS

IN THE FIRST VOLUME.

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E.

Ejectment.

See INJUNCTION 5, 6. EVIDENCE 2, 3.

1. Neither a tenant in common, nor any other, can be admitted a defendant in ejectment, without confessing lease, entry, and ouster.

Doe on dem. Duplex v. Roe. 86

Endowment.

1. In a bill by the vicar for agistment tithe, which had never been received at all in the parish, the Court decreed for the vicar's claim, without an issue, on the evidence of terriers and other old documents, which described him as entitled to all small tithes, except wool and lamb.

Garnons v. Barnard. 296

2. A modus, bad in law, received by the vicar, is proof of endowment of the tithe for which the modus was paid.

Travis v. Orton. Page 309 n.

3. Where an endowment was produced, but there had been no per-

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ception of tithes under it, but a small salary in lieu of them, the Court directed an issue to try the title of the tithes.

Carr v. Henton. Page 313. n.

4. Payment of a composition for tithes of turnips, whether pulled or eaten off, where neither party considered it as an agistment tithe. is no evidence of perception of that species of tithe.

Garnons v. Barnard. 320

Equity.

See BILL 1. TITHES 1, 4.

1. One erroneously believing himself entitled to a copyhold, sold it. It afterwards descended to him. He died without perfecting the conveyance. This is a personal equity, and does not bind his heir. *Semb.*

Morse v. Faulkner. 11.

2. Where a tenant, under a void lease, makes expensive improvements with the knowledge and approbation of the landlord, he is entitled in equity to a valid lease. *Semb.*

Hardcastle v. Shafto. 184

Error.

1. A court of error ought to give the same judgment upon reversal, which the court below ought to have given.

The King v. Amery. 178

Estate Tail.

See PRACTICE (in Equity) 3.

Evidence.

See STATUTE, Page 1. BILL 1.
ENDOWMENT 2, 4.

1. A letter, of which a considerable part appears obliterated, is not admissible as evidence. *Semb.*

227

2. If, at the trial of a cause, the counsel on both sides argue on the effect of an instrument, as being in evidence, and it is by mistake never in fact produced, after verdict, the omission cannot be taken advantage of.

Doe on dem. Duplex v. Perry.

266

3. Whether proof of payment of rent, in the name of the trustees of a charity, is sufficient proof of possession in them. *Quære?*

Ibid. 266

4. To set aside a verdict, and judgment, as obtained by the attorney without the leave of the client, the best evidence is the affidavit of the client, which must therefore be produced.

Heath v. Yeomans. 271

5. Proof of delivery of a cheese, (payable as a modus,) at the house of the tithe-gatherer, but not to himself, cannot be admitted to prove perception of the modus.

Wake v. Russ. 295

6. Evidence of the declarations of a man since dead, as to a fact done by himself, is not admissible.

Garnons v. Barnard. 290

Exchequer.

1. An action of trespass against revenue officers, for their conduct in the execution of their office, may be removed from the other

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courts of law into the office of pleas.

Anon. Page 205

2. The removal of actions in which the revenue is concerned, operates by way of injunction.

Cawthorne v. Campbell. 205

3. It takes place, 1st, Where any matter properly cognizable in the Exchequer is drawn into question in another court. 2d, Where the matter of the suit touches the profit of the King.

Ibid. 210.

4. The officers of revenue have not any privilege of being sued in the Court of Exchequer. *Semb.*

Ibid. 217

5. The regulations for preserving the revenue are properly cognizable in the Exchequer, and any action relating to them may be removed into this Court.

Ibid. 220

6. A moiety of a forfeiture in a popular action, vested by judgment in the Crown, is a branch of the revenue, for which the Crown has priority of process, and is entitled to stop all suits concerning it in any other court than the Exchequer.

Cawthorne v. Campbell. 221

Executor.

1. A testator directs that his business shall be carried on by *E. P.* The executors permit *E. P.* to get in the outstanding debts. There being no such direction in the will, the executors are liable.

Pistor v. Dunbar. 107

Extent.

Vide EXCHEQUER, Page 6.

1. A debtor of the Crown may gain a priority for his own demand before other creditors by extent, although it is sworn that the Crown is in no danger; and the Court have no discretion to prevent him.

The King v. Blatchford. 162

2. Where two extents issue into different counties, the sheriff who completes his levy is entitled to full poundage.

Rex v. Caldwell. 279

F.

Fraud.

See TRUST 6. LIEN 1.

1. A purchase of an estate at a half-penny a yard, when the vendee knew that not to be one-fourth of the real value, is fraudulent, and void in equity.

Deane v. Rastron. Page 64

Frauds (Statute of)

1. Sale of a share of a ship, or sale of a ship at sea, is good without actual delivery.

Addis v. Baker. 222

G.

Gaming.

See DISCOVERY 3.

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Glass.

Vide STATUTE, Page 2, 4.

I.

Injunction.

See PRACTICE (in Equity) 9.

1. On an injunction obtained, the Court will not discharge the plaintiff out of custody, if taken on legal process.

Willis v. Daniel. 36

2. Where a party is taken on legal process, after he has obtained an injunction, but before notice given of it, it is no contempt.

Ibid. 36

3. A conditional consent to proceed at law waives an injunction.

Grant v. Priddell. 62

4. Motion to restrain the defendant, widow and administratrix of the intestate, from disposing of his property in the funds, on the ground of having squandered the real estate, of which she was in possession for the plaintiffs, the children. Granted as to two-thirds, the share of the plaintiffs.

Rogers v. Rogers. 174

5. Where the principal dispute is as to the locality of the lands of each, equity will not allow the defendant, after recovering an ejectment, to take out execution where he chooses.

Hardcastle v. Shafto. 184

6. When lands are confused, and the plaintiff at law recovers on an instrument, which states the whole to be twenty-five acres, and that eighteen belong to him, whereas in fact the whole is only twenty-one acres, equity will not permit

him to take out execution for eighteen. He must abate proportionably.

Hardcastle v. Shafto. Page 184

7. After an injunction dissolved on the merits, the plaintiff cannot, on an amended bill, have another injunction, without a special affidavit of merits, though the defendant be in contempt for not answering.

Longham v. Toule. 188

8. On a commission to examine witnesses in *India* not being returned in two years, the Court will dissolve the injunction.

Penney v. Edgar. 276.

Insolvent Act.

1. Bill by an insolvent debtor against his assignees, under the 14 Geo. III. and against a debtor to his estate, stating collusion between them in not recovering the debt, praying that the assignees might be removed, and that specific performance of an agreement for a lease might be decreed against the other defendant. Plea by the debtor, the assignment under the act, and that the right to sue was vested in the assignees, and denying collusion, is good.

Bowser v. Hughes. Page 101

Issue.

See ENDOWMENT 1, 3. TITHES 4.

L.

Laches.

See TRUST 4. MORTGAGE 4. LEGACY 1.

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Lease.

1. Lease by a tenant in tail, for more than twenty-one years, is good for that period.

Hardcastle v. Shafto. Page 77

Leather.

Vide STATUTES 3.

Legacy.

1. The testator leaves assets sufficient to pay all debts and legacies. The legatees receive payment, which the creditors might also have had, if they had demanded it in time. They lie by for eleven years, and the estate is wasted; yet the legatees shall refund.

Hardwick v. Mynd. 112

Length of Time.

See MORTGAGE 4. *See* TRUST 4.
LEGACY 1.

Lien.

See COSTS 4, 10.

M.

Maintenance.

See DISCOVERY 4, 5.

Modus.

See EVIDENCE, Page 5.

1. A bill to establish a modus for every ancient farm, stating the whole parish to consist of ancient farms, but not setting forth the abutments of each, is bad.

Scott v. Allgood. 16

2. A modus for every ancient orchard is good.

Ibid. 16

3. A modus of every tenth day's cheese, during twenty weeks, from *Holyrood* day, in lieu of tithe of milk, is good. *Semb.*

Wake v. Russ. 295

4. A modus of a penny in lieu of tithe of hay of the lands occupied with each house in the parish, is bad.

Travis v. Oxtou. 309. n.

5. A modus of one penny for every sheep, and a half-penny for every lamb, brought into the parish after *Candlemas*, and sold out before shearing time, is a wool modus, not an agistment modus.

Garnons v. Barnard. 320

6. A modus of two-pence, payable by every householder or inhabitant in the parish, for all tithe of fuel, of fruits, of agistment, and of wood, is good.

Bennet v. Read. 322 n.

7. Another modus of three-pence for all sheep carried out of the parish between *Candlemas* and shearing time, covering the same place and persons, does not contradict the former modus for agistment, but is only to be considered as limiting it in the extent covered by the latter.

Ibid. 323

8. It is no objection to a modus, that it falls unequally on the parishioners, by being as heavy on the occupiers of small, as of large tenements and farms.

Ibid. 323

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9. A modus applicable to the inhabitants of a village has sufficient perpetuity in contemplation of law.

Bennet v. Read. Page 328.

10. A modus covering a parish is rather a custom than a prescription, and may be good where a prescriptive modus, covering particular lands, would be bad.

Ibid. 329

11. A customary mode of tithing sheep, paying one penny *per* head for sheep brought into the parish after *Candlemas*, and clipt in the parish, in lieu of tithe of wool; threepence *per* head for sheep in the parish before *Candlemas*, and carried out before shearing time, as an average payment for the wool carried out is good. The latter may be a wool modus, though the tithe of wool is not then due.

Ellis v. Saul. 341

12. By such a customary mode of tithing sheep, though the payments are made to the rector, and the endowment of the vicar comprehends all the small tithes, yet the agistment tithe of sheep is covered.

Ibid. 342

13. Unnecessary words used in the laying a modus, which would make it indefinite, may be expunged.

Ibid. 341

Mortgagee.

1. A mortgagee is not bound to leave premises in as good repair as he found them; but only in as good repair as might be expected from the owner.

Russel v. Smithies. 96

2. Devise for payment of debts, the

trustees convey to *A. B.* for the purposes of the trust. *A. B.* mortgages to several persons who have notice of the trust. These mortgages are good.

Hardwick v. Mynd. Page 109

3. A mortgagee takes a bond from the assignee of the devisee for the arrears of the interest then due, and gives a receipt. The bond is unpaid. The interest is still secured by the mortgage.

Ibid. 111

4. Baron and feme seized in fee in right of the feme mortgage by fine, and afterwards convey the equity of redemption by lease and release to the mortgagee. The mortgagee having remained in possession as complete owner for more than twenty years, during the life of the husband, tenant by the curtesy, the heir of the wife is barred of his equity of redemption by the lapse of time.

Corbett v. Barker. 138

O.

Officer.

Vide EXCHEQUER 1, 4.

P.

Partners.

Vide COVENANT 1.

1. The Court cannot make any allowance to one partner for the expence of entertaining the customers. The accounts having

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been annually balanced without such an *item*, is conclusive.

Thornton v. Proctor. Page 94

Personal Representative.

Vide DEVISE 2.

Plea (in Equity.)

1. Where a plea is a bar to the whole bill, if at all, an answer to any matters which might have been covered by the plea overrules it.

Blacket v. Langlands. 14

2. Where the bill charged an award to have been obtained corruptly, a plea setting up the award, and denying the specific charges of fraud, is bad, as not bringing the cause to one point, and an answer to the same charges overrules the plea.

Pope v. Bish. 59

S. P. Edmundson v. Hartley. 97

3. Bill by an insolvent debtor against his assignees, and a creditor to his estate, charging collusion. Plea that the plaintiff had been discharged under the insolvent act, (without shewing that all the requisites had been complied with,) and denying collusion, was held good.

Bowser v. Hughes. 101

4. It is no objection, that all the matters of the plea, except the denial of collusion, are contained in the bill.

Ibid. 101

5. Bill charging fraud in obtaining a release. Plea, the release, supported by an answer denying the fraud. The benefit of the plea was saved to the hearing.

Lloyd v. Smith. Page 258

6. Bill to set aside a release for fraud. Plea, the release nakedly, and no answer. The Court would not give leave to amend, but overruled the plea.

Freeland v. Johnson. 276

Pleas and Pleading (at Law).

Vide COVENANT 1, 2.

1. An information stating a vessel to have been within four leagues of the coast, *having on board Geneva, liable to forfeiture on being imported into this kingdom*, is bad for the uncertainty, the Geneva being permitted to be imported, unless under certain restrictions, which ought therefore to have been set forth, and the case brought within them.

The Attorney General v. Lemerchant.

2. *Sci. Fa.* on a recognizance which was conditioned for the due performance of articles entered into by *A. B.* Plea that the defendants never had a *counterpart* of the articles; that *A. B.* had performed all the affirmative covenants; that they contained only one negative covenant (stating it,) which had also been complied with. The plea held bad.

The King v. Marsh. 193

3. *Declaration* for fishing in plaintiff's several fishery. *Plea*, averring the *locus in quo* to be an arm of the sea, in which all have a right to fish. *Replication*, averring exclusive right of fishery by prescription, traverses the general right. *Rejoinder*, traversing the prescriptive claim of the plaintiff. *Demurrer* thereto. The rejoinder is good, for the traverse in the re-

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plication was bad, and the defendant might pass it by.

Richardson v. Mayor of Orford.
Page 231

4. Where a fact is stated, from which the law presumes a general right of all the King's subjects, that must be negatived by a particular contradictory right. The issue cannot be on the general right.

Ibid. 231

5. Action for false imprisonment. Plea 1st, Not guilty. 2d, A justification under a warrant for felony. The plaintiff new assigned the trespass, as having happened after the warrant was spent. Plea thereto, Not guilty. Verdict generally for the plaintiff, and entire damages. The Court will apply the damages to the issue on the new assignment, *ut res magis valeat quam pereat*.

Webb v. Allen. 261

6. For such an imprisonment, after the defendant knew that the plaintiff had been acquitted of the felony for which the warrant was issued, the proper action is trespass.

Ibid. 261

Power.

1. Devise to A. for life, with liberty to leave the same to whom she thought most deserving of it, recommending to her to have a due regard to the testatrix's mother's relations, is not mandatory as the objects of the appointment.
Randal v. Hearle. 124
2. A power of appointment on certain contingencies in a feme covert, may be executed immediately, and the interest of the pur-

chaser established, the wife consented in Court.

Guise v. Small. 277

Proviso.

Vide ACT OF PARLIAMENT 1.

Privilege.

Vide EXCHEQUER 1, 4.

Practice (Equity).

See COSTS. INJUNCTION. DISCOVERY.

1. Where two persons jointly purchased a lot sold under the decree, the Court would not permit one of them to pay into Court his proportion of the purchase money.

Darkin v. Marye. 22

2. The report of the matter concerning trustees approved of by him does not require confirmation.

Latimer v. Clare. 57

3. Where money was in Court decreed to be laid out in land, the Court refused to let it be paid out to the person first entitled to an estate-tail in it, with the ultimate remainder in fee, if any intermediate remainders should be found to exist.

Hardcastle v. Shafto. Page 67

4. Where there is only one defendant, the *subpœna* itself must be served.

De Tillon v. Sidney. 79

5. On exceptions to an answer, if the defendant means to submit to them, he must give notice thereof.

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before he can file his amended answer.

Anon. Page 86

6. The Court allowed the defendant in a suit for tithes, after publication, to prove an old paper found in the parish registry.

Clarke v. Jennings. 173

7. Motion to restrain the defendant, widow and administratrix of the intestate, from disposing of his property in the funds, on the ground of having squandered the rents of the real estate, of which she was in possession for the plaintiffs, the children. Granted only as to the two-thirds, the share of the plaintiffs.

Rogers v. Rogers. 174

8. A commission to examine witnesses abroad, cannot be obtained without an affidavit of materiality, although the suit is merely to obtain evidence to support an action.

Anon. 201

9. On exceptions overruled, the plaintiff cannot move to dissolve an injunction, unless he has obtained a previous order nisi for that purpose.

— v. Dubarry. 255

10. Suit for tithes. The answer insisting on a modus. Motion to pay up the arrears of the modus, and the plaintiff to proceed at his peril. Refused, for that is only done where the thing demanded is offered. But the Court afterwards considered the tender in the costs.

Dean of Bristol v. Donnesthorpe.

272

11. A party who means to object to the report of the Deputy Remembrancer, must state his objections in a reasonable time, before the time fixed for signing the report.

Anon. 277

Practice (Plea and Revenue Side.)

See COSTS. EJECTMENT I. EVIDENCE 2, 4.

1. This Court will not set aside a judgment regularly entered up, on the ground of usury or extortion in obtaining it.

Matthews v. Lewis. Page 7

2. In an action against revenue officers, they had judgment, and the plaintiff was taken in execution for the treble costs. On a review of taxation, the treble costs were disallowed, and the single costs not being taxed, he was discharged. He was afterwards taken on a *Ca. Sa.* for the single costs. This was held regular.

Tye v. Saunders. 38

3. Where a recognizance of bail in C. B. is put in suit here, the plaintiff can have no advantage which he would not have had in that Court.

Vincent v. Brady. 47

4. A waiver of an irregularity in process, by appearance, does not relate back, so as to bring the defendant into contempt for not appearing in time.

Robinson v. Nash. 76

5. No officer can *certify* his own mistake. He must make an affidavit of the fact.

Rex v. Bolton. 79

6. A motion to discharge a defendant out of custody, on the ground of bankruptcy and certificate in *Ireland*, must be on affidavit of the effect of the certificate by the laws of *Ireland*.

Anon. 80

7. A defendant was seized on a *Sunday*, and detained till next morning, and then arrested upon process of this Court. The arrest is

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- void, and cannot be made good even by a subsequent consent.
Lyford v. Tyrel. Page 86
8. Motion to change the *Venue* into *Herefordshire*, on affidavit that the cause of action arose in one or both of two *Welsh* counties, to both of which that was the nearest *English* county. Refused.
Anon. 115
9. Irregular notice of executing a writ of enquiry is cured by the defendant's lying by, and allowing the enquiry to be completed.
Viner v. Clarke. 175
10. A writ of error is allowed two days after the return of the *Ca. Sa.* The bail may be sued pending the writ of error, which is no *superseas*.
French v. Casenove. 176
11. If a judgment is entered in *K.B.* without costs, where costs ought to have been given, it can only be amended in the same term. So in the House of Lords, no amendment can be in such case after the Session.
The King v. Amery. 178
12. A warrant of attorney to enter up judgment is a personal authority, and dies with the person, and although given for a valuable consideration, his executors cannot put it in force.
Short v. Coglin. 225
13. This Court will not refer it to the Master to calculate what is due on a bill of exchange, on judgment by default.
Chilton v. Harborn. 249
14. The Court will not, in a motion for an order on the officers of the customs, decide a material question of revenue, *vis.* From what time the exportation of corn, so as to entitle to the bounties, is reckoned.
Ex parte Wilson. 269
15. Where the bail below become bail above, and they do not jus-

tify upon being excepted to, the plaintiff cannot take an assignment of the bail-bond.

- Babb v. Barber.* Page 274
16. Motion to execute a writ of enquiry before the judge of assize. Refused.

Morris v. Girling. 275

Prerogative.

See EXTENT. EXCHEQUER.

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R.

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S.

Satisfaction.

See MORTGAGE 3.

Set off.

See COSTS 4, 7, 10.

Ships.

The statutes 24 Geo. III. c. 47. and 27 Geo. III. c. 32. do not so

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clearly mark the distinctions between the different sorts of vessels there mentioned, as to supersede evidence upon it.

Gossley v. Barlow. Page 23
Whether a licence for a ship "to be employed in the coasting trade" generally, is good. *Quære?*

Ibid.
Sale of a share of a ship is good without actual delivery.

Addis v. Baker. 222
Whether an executory agreement for the sale of a ship must recite the registry under the 26 Geo. III. c. 60. s. 17. *Quære?*

Ibid.

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Statutes.

1. No evidence of the technical meaning of a word can be admitted to explain a statute.

The Attorney General v. The Cast Plate Glass Company. 39

2. The 27 Geo. III. c. 28. s. 15. by the word *square* means all rectangular figures.

Ibid.

3. A tanner selling hides by retail is not within the penalties of 24 Geo. III. c. 19.

The Attorney General v. Dennis. 266

4. Breaking the moiles of glass bottles into the pot is a putting in fresh materials, within the 17 Geo. III. c. 39.

The Attorney General v. Parke. 240

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Tithes.

See MODUS. COMPOSITION REAL.
DISCOVERY 4. PRACTICE 10.
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LEASE 1.

1. A rector having come to an agreement with his parishioners for

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tithes, cannot in equity set up his own non residence to avoid the contract.

Atkinson v. Folkes. Page 67

2. Such an agreement is not within the 13 or 14 *Eliz.* *Semb.*

Ibid.

3. In a bill for account of tithes, it is not necessary to waive the treble value.

Wools v. Walley. 100

4. Where a layman is in possession of a portion of tithes under a title traced back for 150 years, a Court of Equity will not disturb the possession, but leave the rector to establish his right at law.

Scott v. Airey. (cited). 311

5. A composition for turnips, whether pulled or eaten off, where neither party considered it as an agistment tithe, is no evidence of perception of that species of tithe.

Garnons v. Barnard. 320

6. Agistment tithe is the tithe of the herbage eaten by cattle not titheable.

Ellis v. Saul. 342

7. Agistment tithe is not within the 2 & 3 *Ed.* VI. c. 13. s. 3.

Ibid.

8. When grass has been cut for hay, no tithe is due for the after pasture.

Ibid.

Trust.

1. A trust, consisting of twenty-five persons, who are to proceed to elect new trustees, so as to fill up their number, when they are reduced to fifteen, may elect before that time.

Doe on dem. Dupleix v. Roe. 86

2. A majority of the trustees may bring actions in the name of the whole.

Ibid.

3. Devise for payment of debts; the devisees convey to *A. B.* for the purposes of the trust, who mortgages to several persons, with notice. These mortgages are good.

Hardwicke v. Mynd. Page 109

4. The creditors received interest from the assignee of the devisees for eleven years, and agreed with him for an increase of interest on their debts, and received the same. The original trustees continue liable.

Hardwick v. Mynd. 110

5. The assignee of the trustees was devisee in fee of other estates under the same will; he conveyed them to one of the trustees to secure a debt due to him from the devisor. The specialty creditors shall take not subject to this incumbrance, as the whole is a fraud upon them.

Ibid. 113

V.

Vendor and Vendee.

See FRAUD 1. STATUTE OF FRAUDS 2, 3. POWER 2. PRACTICE (in Equity) 12.

1. *A.* devised property to his wife, in trust, to divide it among his seven children, in such proportions as they should deserve. One of the children sold her share, and covenanted to make it a full seventh. This is good without the mother joining.

Musprat v. Gordon. 34

Venue.

See PRACTICE 8.

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U.

Usury.

See PRACTICE (at Law) 1.

An extorting *post obit*, however gross, cannot be considered as usury.

Matthews v. Laws. Page 7.

W.

Wager.

1. A declaration on a wager whether a certain agreement, purporting to be subscribed by A.

really was subscribed by him, is good after verdict.

Mucklesfield v. Hepgin. 133

Warrant of Attorney.

See PRACTICE (on the Plea side) 12.

Writ.

1. A writ under 6 Ann. c. 23. to certify that a Scotch Peer had taken the oaths in Chancery, does not require a teste; and if the teste is repugnant and impossible, it shall not vitiate.

In the matter of the Duke of Leeds 143.

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